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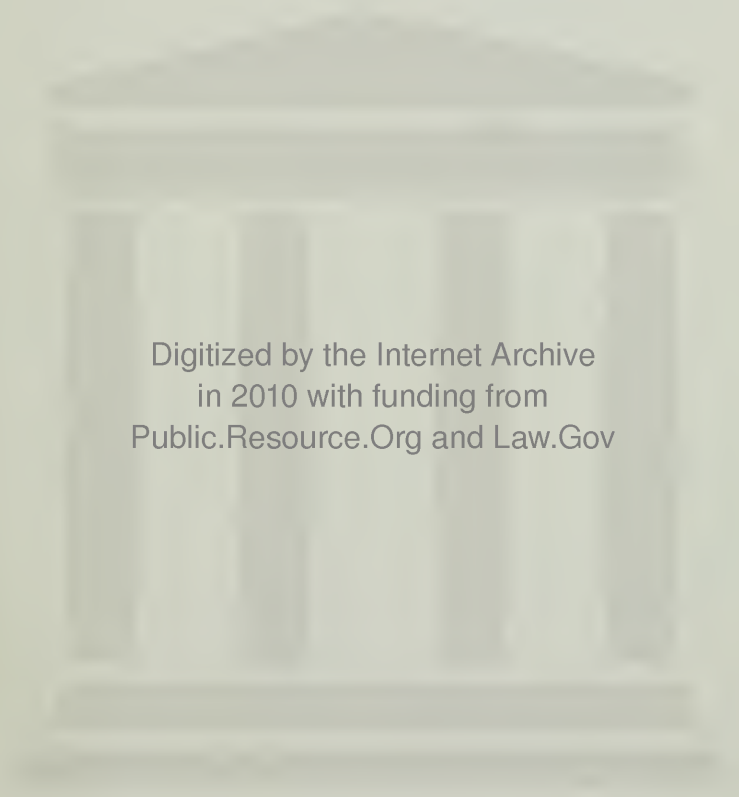

No. 14970.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FURUKAWA,

Appellant,

vs.

YOSHIO OGAWA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal from a judgment entered by the United States District Court for the Southern District of California, Central Division, in an action for damages for personal injuries sustained by the Appellee, Yoshio Ogawa, when he fell into an open pit in a dump yard owned and operated by the Appellant, John Furukawa, in the City of Los Angeles, State of California.

Judgment was entered on August 4, 1955 [Tr. p. 34].

Motion for new trial was filed on August 12, 1955 [Tr. p. 36] and after argument, was denied by the Court on October 17, 1955 [Tr. p. 36].

Notice of Appeal was filed on November 9, 1955 [Tr. p. 37].

Stipulation fixing the bond on appeal was filed November 9, 1955 [Tr. p. 38] and an order was made by the Court approving the bond on appeal [Tr. p. 38].

Statement of Points on Appeal was filed November 18, 1955 [Tr. p. 39].

Jurisdiction was vested in the District Court by reason of the fact that the Appellee was at all times a citizen of a foreign nation, to wit, Japan, and the Appellant was at all times a citizen of the United States. See allegations of Paragraph I, first cause of action [Tr. p. 3] and pretrial order of the District Court, Stipulation 1 [Tr. p. 15], together with finding of fact No. 1 [Tr. p. 27].

The Constitution of the United States expressly provides for the jurisdiction in the District Court of suits between a citizen of a foreign state or country and a citizen of the United States.

Constitution of the United States, Art. 3, Sec. 2.

See also:

28 U. S. C. A. 225.

An appeal from a final judgment of the United States District Court to the United States Court of Appeals is authorized by the provisions of the Judicial Code, 28 U. S. C. A. 1291.

A. Statement of the Case.

The Appellee, Yoshio Ogawa, was a gardener on September 5, 1953. He had during the course of his gardening activities loaded his truck with two bundles of cut grass and had driven to a dump yard operated by the Appellant.

Appellee had been using the dump yard for approximately two years prior to the date in question. In the dump yard there was a pit. At the time of the accident there was a cement retaining wall along three sides of the pit. The cement retaining wall extended approximately one foot above the adjacent ground and the width of the cement border of the retaining wall was approximately 18 inches.

The Appellant, John Furukawa, in addition to owning the dump yard, also owned a two-ton stake truck, which was parked in the pit. The stakes of the truck extended approximately 2 feet above the top of the cement edge of the retaining wall. The Appellee drove into the dump yard for the purpose of disposing of the refuse he had accumulated. It was customary to stand upon the cement retaining wall and throw the burlap parcel into the bed of the stake truck, thereby dropping the contents into the truck. The distance between the side of the truck and the edge or wall of the pit was approximately 1 foot to 18 inches, depending upon how closely the truck was parked to the opposite side of the pit.

Prior to the date in question, the Appellant's truck had been involved in an accident and as a result thereof, a small piece of metal which was a part of the side of the truck, was caused to protrude 2 to 4 inches above the bed of the truck. It was jagged in appearance.

Appellee was thoroughly familiar with the dumping operations of the Appellant. Although the condition of the concrete at the top of the pit varied from time to time, Appellee admitted that the cement at the top of the pit at the time of the accident was covered with grass and cut trees. This had been the same condition that he had observed on other visits to the pit.

Appellee got out of his truck, and threw one of the burlap sacks full of grass into the open truck. The manner in which the Appellee would perform the dumping operation was simple. A large piece of burlap, approximately 5 feet square, was used and the debris was placed in the center of the burlap, the ends being brought together so as to make a bundle. The Appellee would take this bundle to the edge of the pit, dumping the entire bundle into the bed of the truck which was in the pit, but retaining hold of the burlap which would then presumably be used by him in the future. In the course of dumping or dropping the second bundle, he slipped or fell and his body dropped between the space between the edge of the pit and the side of the truck. During his progress between this small space, his body came in contact with the piece of metal which has been described, and he sustained a wound on his leg,

for which injury he sought damages. No complaint is made of the amount of the judgment.

The trial Court found that the Appellant was guilty of negligence in maintaining the dump yard pit and the top of the wall in a negligent and careless manner and that he was further negligent in maintaining the truck in said pit, with the projection caused by the break in the metal which extended from the edge of the bed of the truck. The Court found that the Appellee's conduct was not *the* proximate cause of his injuries. The Court further found that Appellee "was not contributorily negligent with respect to the hazard created by said projecting metal hook * * *."

The questions involved relate to the sufficiency of the evidence to sustain the judgment in favor of the Appellee and relating specifically to the issues of negligence, proximate cause, contributory negligence and assumption of risk.

Specifications of Assignments of Error.

The specifications of error are contained in the statement of points relied upon, and are as follows:

1. There was no evidence of negligence on the part of the Appellant John Furukawa;

2. There was no evidence showing or tending to show any proximate causal relation between any act or omission on the part of the Appellant and the injury and damage sustained by the Appellee;

3. As a matter of law the plaintiff was guilty of contributory negligence;

4. As a matter of law the plaintiff assumed the risk of any injury;

5. The evidence does not support the Findings of Fact and Conclusions of Law in the following respects:

(a) The finding that the defendant was negligent is unsupported;

(b) The finding that the negligence of the defendant (52) proximately caused the injuries to plaintiff, is unsupported;

(c) The finding that plaintiff was guilty of no contributory negligence is unsupported.

SUMMARY OF ARGUMENT.

The evidence fails to establish any actionable negligence on the part of Appellant. The evidence was uncontradicted that the condition which the Appellee described was no different from that which he had observed in the two years that he had used the same pit preceding the accident. Whatever the condition was, it was *open* and *obvious*. The accident occurred in the daylight hours and there was no duty on the part of Appellant *to warn* the Appellee of any condition which may have existed at the top of the pit. The evidence demonstrates from the Appellee's own mouth, that the cause of his fall between the edge of the pit and the truck, was his own conduct in pulling too violently on the gunny sack loaded with debris.

There is no evidence to justify the conclusion that the Appellant could possibly have anticipated that anybody using the pit would fall in the small space between the edge of the pit and the side of the truck in such a manner as to come in contact with the small piece of metal which was protruding from the side of the truck. This tiny area was not one in which the Appellant could reasonably have anticipated that any person would fall or otherwise be involved. The finding that the Appellant was negligent in connection with the maintenance of the truck is utterly untenable.

Appellee was guilty of negligence as a matter of law which proximately *contributed* to his injury. As a matter of law, he assumed the risk of a fall and resulting injury. The Court's finding that the "plaintiff's conduct was not *the* proximate cause of his injuries, was not a determination by the trial court on the issue of contributory negligence, since a plaintiff is barred from recovery if his conduct is *a* proximate cause of his injuries, *i. e.,* contributes in *some* degree to his injuries.

The Court's finding that the "plaintiff was not contributorily negligent with respect to the hazard created by said projecting metal hook" was in effect a negative pregnant and clearly sustains Appellant's position that plaintiff was guilty of negligence which proximately *contributed in some degree to the happening of the accident,* particularly when viewed in the light of a finding that, "the fact that the plaintiff has failed to exercise reasonable care for his own safety does not bar recovery * * *."

ARGUMENT OF CASE.

I.

There Is No Evidence in the Record Sufficient to Sustain the Finding of Fact That the Appellant Was Guilty of Actionable Negligence; There Is No Evidence Sufficient to Sustain the Finding of Fact That There Was Any Proximate Causal Relationship Between Any Conduct on the Part of Appellant and the Injury or Damage Sustained by Appellee.

Under this heading Appellant will present Points 1 and 2 set forth in the statement of points on appeal [Tr. p. 39].

The facts of the case are peculiarly simple and with the exception of the evidence relating to the piece of metal extending from the bed of the truck, are uncontradicted.

Appellant maintained a private dump yard which was used by Appellee and other gardeners for the disposition of refuse and trash [Tr. p. 15]. Appellee had used this dump for approximately two years prior to the accident and paid the Appellant $8.00 per month for the privilege of disposing of trash and refuse [Tr. p. 15].

In the dump yard there was located a pit large enough to accommodate a two-ton truck owned by Appellant [Tr. p. 15]. This truck was a high stake truck. The truck was backed into a pit which had been dug into the ground in the dump yard. The pit was approximately 9½ feet wide. The truck which was parked in the pit was 8 feet in width [Tr. p. 120]. A cement retaining wall was constructed along three sides of the pit. The wall extended approximately 1 foot above the adjacent ground, and the cement border of the retaining wall was approximately 18 inches wide [Tr. p. 16].

The Appellee backed his truck to the retaining wall for the purpose of disposing of the refuse which he had accomulated during the day. It was daylight [Tr. p. 16].

Appellee stated that at the time he arrived at the pit there was grass and cut trees alongside the pit and on the cement top [Tr. p. 43. See also Pltf. Ex. 1, a photograph]. This was precisely the same condition that the Appellee had observed throughout the period of time that he had used the pit from 1951 to 1953 [Tr. p. 61].

Appellee testified: [Tr. p. 43]

> "Q. (By Mr. Greenberg): What was the condition of the cement top of the pit? A. You mean the top of the pit?
>
> Q. Yes. A. Grass and cut trees, stuff.
>
> Q. That was alongside the pit and on the cement top? A. Yes."

He further testified: [Tr. p. 61]

> "Q. On September 5, 1953, was it (referring to the condition on the top of the cement strip) any different from any other day that you had gone there? A. Same."

There was no protection or covering between the edge of the cement and the Appellant's truck which was parked in the pit. This was fully known to Appellee [Tr. p. 44]. The accident which occurred is best described by the Appellee himself [Tr. pp. 44-45]:

> "Q. Did you intend to take the grass from your truck in to the truck that was parked in the defendant's pit? A. Yes.
>
> Q. How did you do this? A. I holding the bundle sack in both hands and put it on the truck.

Q. Where did you stand when you put the sack into the defendant's truck? A. Close to the truck.

Q. On what did you stand? A. On the cement pit.

Q. After you put the bundle in the truck and after you were standing on the cement edge of the pit, what did you do then? A. Then pulled out my sack.

Q. Would you show the court how you pulled out your sack? A. Dumped in and pulled the sack.

Q. Was there any covering or protection between the edge of the cement and the defendant's truck? A. Nothing.

Q. Nothing at all? A. No.

Q. As you were standing and disposing of your rubbish, how did the accident happen? What happened? A. Pulled the sack, same time slipped the foot.

Q. And where did you fall, or did you fall? A. Between the truck and the pit wall.

Q. And then what happened? A. And then I want to get out but I can't get out. Right side of the foot catch on some iron that stick out truck side, so I hollered to help me."

That Appellee had full knowledge of the precise condition of the top of the pit, is indicated by his own testimony, described in great detail [Tr. pp. 82-83]. After describing the condition of the debris, the Appellee testified that he was standing *on* the trash close to the truck [Tr. p. 84]. He took his first gunnysack of debris toward the front of the truck and the second toward the rear [Tr. p. 85]. He could see the truck walls and knew that there was about a foot between the body of the truck and the pit wall [Tr. p. 85]. He knew that if he stepped down in between the wall of the pit and the truck body, that

he would fall in. He took the second load into the truck and still had hold of the gunnysack before he fell [Tr. p. 86].

He stated: [Tr. p. 87]

> "I noticed that the second package was heavier and harder harder to dump, so I exerted more physical strength in trying to dump the second package. * * *
>
> Q. In other words, when you threw your gunny sack into the truck and began pulling the gunny sack from under your rubbish, it was heavier the second time; is that correct? A. Yes, it was heavier and for that reason I pulled much—
>
> Q. Violently? A. Violently or stronger. * * *
>
> Q. And as you pulled you lost your balance, is that what happened? A. Yes.
>
> Q. Then what happened? A. Then I fell off.
>
> Q. There was nothing on which you were standing that caused you to slip, then, was there? A. Well, my testimony is that *because I had to pull harder my feet slipped and then went forward.*" (Italics added.)
>
> * * * * * * * *
>
> "Q. Now, on what did you slip? A. I think it was because I pulled hard." [Tr. p. 88]

As a result of his conduct the Appellee was precipitated into the 12 to 18-inch space between the pit wall and truck, and during the course of his fall from the top of the pit of the bottom of the pit, his leg hit the slightly projecting piece of metal which has been previously described.

Appellant is thoroughly familiar with the fundamental rule that ordinarily questions of negligence, proximate

cause and contributory negligence are questions of fact for the trier of fact. A well recognized exception, however, appears to this rule which is perhaps best stated by the California Supreme Court in the case of *Jacobson v. Northwestern Pacific R. R.,* 175 Cal. 468, at 473, where the court states:

> "While ordinarily the question of negligence is one of fact to be determined by the jury, nevertheless, where the undisputed evidence is such that only one inference can be drawn therefrom, or it is of a character so conclusive that the court should in the exercise of its discretion set aside a verdict not in accord therewith, the question is one of law which warrants the court in directing a proper verdict. (*Davis v. California St. Ry. Co.,* 105 Cal. 131, 38 Pac. 647; *Delaware R. R. Co. v. Converse,* 139 U. S. 469, 35 L. Ed. 213, 11 S. Ct. 569.)"

See also *Estate of Sharon,* 179 Cal. 447; *Gleason v. Fire Protection Engineering Co.,* 127 Cal. App. 754, at 756; *McGraw v. Friend etc. Lumber Co.,* 120 Cal. 574.

From the testimony and the evidence hereinabove referred to, it is obvious that there is no foundation whatever in the record supporting the finding of actionable negligence on the part of the Appellant.

Actionable negligence involves the concept of a duty, and a breach of that duty proximately causing injury or damage to the injured party.

Smith v. Buttner, 90 Cal. 95.

As the author says in 19 Cal. Jur. p. 551:

> "These three elements—duty, breach and injury—when brought together constitute actionable negligence and the absence of any one prevents a recovery."

See also *Means v. So. Calif. Ry. Co.,* 144 Cal. 473.

It is fundamental that an invitor must exercise ordinary care to keep his premises in a reasonably safe condition for his invitees. It is equally as fundamental that an invitor has no duty to warn an invitee of an *obvious* defect or danger.

Blodgett v. Dyas Co., 4 Cal. 2d 511;

Slyter v. Clinton Const., 107 Cal. App. 348;

Shanley v. Amer. Olive Co., 185 Cal. 552;

Vitrano v. Westgate Sea Prod. Co., 34 Cal. App. 2d 462;

Funari v. Gravem-Inglis Baking Co., 40 Cal. App. 2d 25.

In the case of *Vitrano v. Westgate Sea Products Co.,* 34 Cal. App. 2d 462, the Court held as *a matter of law* that there was *no duty* to warn an invitee of an open or obvious danger. The parallel between the *Vitrano* case and the case at bar is strikingly similar. In that case the decedent was an invitee who had brought certain fish nets upon the premises of the defendant. The nets were placed in certain vats and were "tanned." The vats were filled with hot water, and the tanning process apparently was a cleaning process. The vat was 12 feet long, 6 feet wide and 4½ feet high, and on either side there was a plank or platform about 35 inches below the top of the vat, upon which the fishermen would stand while they lowered the nets into the solution. The top of this area became slimy and covered with debris during the tanning process. On the day in question the decedent apparently slipped on some of the debris and fell into the tanning vat containing the hot water, and was killed.

The Court states, at page 465:

> "Among other things, the invitor is under the obligation to warn the invitee of any dangers of which he has knowledge and which are not readily apparent to the eye. There is no such duty where the dangers are obvious or as well known to the invitee as to the owner of the premises. (*Mautino v. Sutter Hospital Assn.,* 211 Cal. 556 (296 Pac. 76).) There is no obligation to give warning of an obvious danger or one which should have been perceived by the invitee through the ordinary use of his own senses. (*Ambrose v. Allen,* 113 Cal. App. 107 (298 Pac. 169).) In *Blodgett v. B. H. Dyas Co.,* 4 Cal. 2d 511 (50 Pac. 2d 801), it is said: 'The owner of property, insofar as an invitee is concerned, is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care.' "

Of particular importance is the case of *Anderson v. Western Pacific R. R. Co.,* 17 Cal. App. 2d 244. In that case the plaintiff was apparently walking upon the premises of an open public dump to salvage some pieces of scrap iron. A bank caved in, precipitating him into a smoldering fire, as a result of which he sustained serious injuries. There was no evidence that the plaintiff was aware of any fire, although there was evidence that he walked around the edge of a hole at which point there was a strip which was black and smoky. Obviously he did not expect that the terrain he was walking on would give way. The Court concluded *as a matter of law,* that whatever condition existed, was an open and obvious con-

dition and a judgment in favor of the plaintiff was reversed on appeal.

The danger to the Appellee in this case was likewise open and obvious. The hazard was *that of falling or slipping from the top of the cement,* either against the body of the truck or between the edge of the cement wall and the body of the truck. Finding No. VIII of the trial court [Tr. pp. 28-29] is utterly unsupported by the evidence. In this finding the Court found that there was a reasonably foreseeable hazard of falling from the top of the cement retaining wall into the pit or into the truck or between the pit and the truck.*

The Court then reaches the most astounding finding of fact that "It was reasonably foreseeable that the results of such a fall would be *minor* cuts, skin burns or bruises" [Tr. p. 29]. How any Court could find that a human body, caused to fall between the edge of a concrete pit and the body of a truck composed of wood and metal, might result in only minor cuts, skin burns or bruises, is utterly beyond the comprehension of Appellant. Obviously the type or character of an injury from such a fall would depend entirely upon how the person fell; whether feet first or head first, or what particular angle was involved in the fall. If the Appellee had fallen head first into the pit and had struck the ground with his head, he might easily have been killed. He might have struck his head against some part other than the jagged, protruding piece of metal and suffered injury far more severe than striking the jagged piece of metal, as for ex-

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*Obviously this finding was necessary, since the evidence is uncontradicted that the condition of the top of the pit was open and obvious and that there would clearly be a foreseeable hazard to the plaintiff of falling into the area described in the finding.

ample, a windwing, or a bumper or sideview mirror, a tail lamp or a hubcap, etc. It is submitted therefore that the hazard to Appellee was not that of being injured by the metal hook, but was the hazard of falling between the edge of the pit and the truck. It was only a happenstance that he struck the metal hook. It might well be that his striking of the metal hook may have prevented far more serious injury. *Obviously he did not intend to fall in the area and strike any portion of the truck,* whether it was the metal projection or otherwise.

The Court's finding in this regard, is based upon pure speculation and conjecture and is insufficient to support the judgment.

In *Reese v. Smith,* 9 Cal. 2d 324, at 328, the Court states:

> "If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish the fact should suffer, and not his adversary * * * a judgment cannot be based on guesses or conjectures."

See also:

McKellar v. Pendergast, 68 Cal. App. 2d 485;

Wilbur v. Emergency Hosp. Assn., 27 Cal. App. 751.

The area between the edge of the pit and the truck was not one where it was anticipated that persons would be *in any event.* The uncontradicted testimony is that the cause of the Appellee's fall was the fact that he pulled *too violently* upon the burlap sack and that as a result he lost his footing. This was the sole proximate cause of his subsequent fall and injuries.

Probably Appellant's position may best be illustrated by another quotation from the case of *Vitrano v. Westgate Sea Prod. Co.,* 34 Cal. 2d 462, at 467, where the Court states:

> "The danger being as obvious to the deceased as it could have been to the respondent, we think the evidence fails to show negligence on the part of the respondent in failing to warn the deceased of the danger and, as was said in *Weddle v. Heath, supra,* 'On the same facts it necessarily follows that the plaintiff was guily of contributory negligence.'"

II.

The Evidence Establishes As a Matter of Law That the Appellee Was Guilty of Contributory Negligence and That He Assumed the Risk of Any Injury.

This point is covered in Points 3, 4 and 5 of the Statement of Points on Appeal [Tr. p. 39]. The defense of contributory negligence was appropriately raised by answer [Tr. p. 14].

The trial Court made a most peculiar finding with respect to the conduct of the Appellee. Since the evidence was uncontradicted that the cause of the fall was the Appellee's own conduct in pulling too hard upon his gunny sack when he was standing on the cement wall which was covered with debris of which he had full knowledge, the Court found that the plaintiff *did foresee* the ordinary and reasonably foreseeable hazard of falling into the pit, or the truck, or the space between the truck and pit, and the reasonably foreseeable results of such fall [Finding No. XV, Tr. p. 30]. There is not one scintilla of evidence which would justify this finding, and Appellant challenges Appellee's counsel to point to any evidence in

the record which would justify the conclusion that the Appellee foresaw that there was an ordinary or reasonable hazard of falling into the pit and thereby sustaining minor bruises or cuts. The Court then found that the plaintiff was *not contributorily negligent as to the unknown hazard,* to wit, the piece of projecting metal from the bed of the truck [Tr. p. 30]. *No such limited issue was raised.*

At the pre-trial the Court properly conceived the issue of contributory negligence and it was set forth in the pre-trial order [Tr. p. 17] as follows:

> "(5) Did plaintiff's conduct constitute contributory negligence?
>
> "(6) Was plaintiff's conduct *a* proximate cause of the injuries sustained by plaintiff?" (Italics added.)

It is fundamental in California that contributory negligence, is negligence on the part of a person injured which cooperating in *some degree* with the negligence of another, helps in proximately causing the injury of which the former thereafter complains. (Calif. Jury Instructions Civil (BAJI) 3rd Revised Ed., p. 139.) See also *Harrison v. Harter,* 129 Cal. App. 22; *Meredith v. Key System Transit Co.,* 91 Cal. App. 448.

As the Court states in *Markham v. Hancock Oil Co.,* 2 Cal. App. 2d 392, at 394:

> "It is well settled that any negligence on the part of a plaintiff which contributes even in a *slight degree* to an accident, is contributory negligence which will bar a recovery."

See also:

Robbins v. Roques, 128 Cal. App. 1;
Steinberger v. Calif. Elec. etc. Co., 176 Cal. 386;
Creamer v. Cerrato, 1 Cal. App. 2d 441;
Holibaugh v. Ito, 21 Cal. App. 2d 480.

The Court concludes its Finding No. XV with the following: "That plaintiff's conduct was not *the* proximate cause of his injuries" [Tr. p. 30]. In his conclusions of law, the Court continues the same finding with reference to the conduct of the Appellee, in the following language: "That plaintiff's conduct was not *the* proximate cause of injury caused to plaintiff by the unknown and unforeseeable hazard of said projecting hook [Conclusion of Law No. VII, Tr. p. 32].

The findings obviously create a negative pregnant. Finding of Fact No. VIII contains the implied finding that the Appellee himself knew of the hazard of falling from the top of the cement wall.

No Finding Was Made by the Trial Court With Reference to the Conduct of the Appellee in Pulling on the Burlap Bag, Thereby Precipitating Himself Into the Area Between the Cement Wall and the Truck.

The Court's finding on the issue of contributory negligence is actually a negative pregnant, since in Paragraph XV the Court finds that the plaintiff was not contributorily negligence as to the hazard, unknown to him, and unforeseeable by him, but known to said defendant, of being cut, hurt, injured and impaled upon said projecting metal hook [Tr. p. 30]. Likewise in the conclusions of law, Finding V, the Court found: "That plaintiff was not contributorily negligence with respect to the hazard cre-

ated by said projecting metal hook, known to said defendant but unknown to plaintiff, and unforeseeable by plaintiff in the exercise of reasonable care."

That this creates a negative pregnant is obvious since the plaintiff may well have been contributorily negligent with respect to his conduct in permitting himself to slip or fall from the top of the cement wall. The Court has obviously limited its finding with respect to the contributory negligence to only *one phase* of the Appellee's conduct.

It is well settled that the conduct of the plaintiff need not be *the sole* proximate cause. If the plaintiff is guilty of any contributory negligence which is *a* proximate cause of injury, *he cannot recover.*

It is obvious that the findings were prepared by the Appellee's counsel. The evidence from the Appellee himself does not even remotely suggest that he foresaw the consequences of his fall or that he assumed that if he did fall he would receive only minor cuts, skin burns or bruises. There is not one word of testimony in the very short record which would justify such a finding and which finding is the basis for the entirely erroneous theory which has been set forth in the findings.

The case of *Funari v. Graven-Inglis Baking Co.,* 40 Cal. App. 2d 25 (Petition for hearing denied by Supreme Court) is particularly interesting because the Appellate Court held as a matter of law that the Appellant was guilty of contributory negligence. There, as here, the Appellant slipped. He was attempting to load an elevator and was fully conscious of the slippery condition of the floor on which he was working. Both feet slipped out from under him and he fell backward, striking his head

and shoulder against a door on the far side of the elevator and his back on a projecting wooden lip at the base of the door. The Appellate Court, after reviewing the evidence, held clearly that the plaintiff's conduct was such as to stamp him guilty of contributory negligence as a matter of law. There, as here, the hazard to the plaintiff was the danger of slipping. The fact that he fell backward and struck his head against the door was an immaterial factor in the case. He could just as easily have slipped forward and broken his leg. The result would have been no different. His conduct is to be governed by the nature and character of the condition under which he undertook to perform the physical movements which brought about his fall.

See also:

Vitrano v. Westgate Sea Products Co., 34 Cal. App. 2d 462.

In *Slyter v. Clinton Construction Co.,* 107 Cal. App. 348, plaintiff was injured when a brick fire wall, to which he and several other plasterers had attached a scaffolding, gave way. The fire wall was not intended for such use and the Court held that as a matter of law plaintiff was guilty of contributory negligence. In a particularly cogent statement, the Court asserted (at p. 355):

> "From the facts it is clear that the plaintiff, as readily as the appellant, or any other person, by the exercise of his faculties of sight and judgment in an ordinarily diligent manner, could have observed and known of the danger attending the hanging of heavy scaffolding over an eight-inch fire wall such as involved in this action. Indeed, no one but a person entirely bereft of all common sense could have failed to perceive, upon mere casual observation, the danger

> of using scaffolding so hung upon which to work. It is therefore, plain that plaintiff, in entering upon the employment under such conditions, while in the prosecution of which he suffered injury, himself assumed the risk of the employment. It is not a case in which even Knowles, much less appellant, was required to instruct or warn plaintiff of the danger of working on the scaffolding hung on such a flimsy structure."

To use an analogy, in the *Slyter* case the hazard was the danger of the falling of the wall. The precise injury to the plaintiff in that case might have varied, depending upon his position on the wall. Assume for example that in the *Slyter* case the owner of the premises had permitted a jagged piece of metal to remain in close proximity to the fire wall, but which piece of metal for some reason or other was not observable to the plaintiff. The effect of the trial Court's holding in the instant case would be to say that the contributory negligence of the plaintiff in the *Slyter* case in mounting the fire wall was to be ignored, since he could appreciate that danger, but did not know about the danger of the metal. The result would be ridiculous.

It is obvious from the Findings of the Court and from the Trial Memorandum of the Plaintiff [Tr. p. 19] that it is contended that the Appellee was not guilty of contributory negligence because he did not know of the defect in the truck. This cannot relieve him of a charge of contributory negligence. It is not necessary that the precise injury or hazard must have been in the mind of the Appellee in order to establish that his negligence in attempting to throw the burlap bag into the truck when he was knowingly standing upon cut grass and debris which

was on the top of the cement wall surrounding the pit, in order that he be found guilty of contributory negligence which in some manner proximately brought about his injuries. It is well settled that in determining the issue of proximate cause in so far as it relates to the issue of contributory negligence, the same standards should be applied to the plaintiff as are applied to the defendant.

As is stated in 65 Corpus Juris Secundum, at page 745:

> "In determining whether the negligence for which plaintiff is responsible is a proximate or remote cause of injury, the same tests must be applied as in determining whether the negligence for which defendant is responsible is a proximate or remote cause thereof."

See:

Postal Telegraph etc. v. Saper, 108 S. W. 2d 259 (Texas Civil Appeals).

It is submitted that the Appellee's injuries were the result of an accident which occurred when the Appellee slipped upon the debris covered surface of the top of the concrete wall. That he was guilty of contributory negligence in attempting to perform the act of throwing his cut grass into the truck, is demonstrated by the evidence and is inherent in the Court's own finding that "plaintiff did foresee the ordinary and reasonable foreseeable hazard of falling into the pit or the truck or the space between the pit and the truck and the reasonable foreseeable result of such fall" [Tr. p. 30, Finding No. XV].

In the case of *Gleason v. Fire Protection Engineering Co.,* 127 Cal. App. 754, the Court held as a matter of law that the plaintiff was not entitled to recover because he was guilty of contributory negligence. He apparently went upon a roof which was slippery with water and was

endeavoring to cover a hole in the skylight. He slipped and fell and as a result thereof crashed through the skylight and was injured. The Court states at page 757:

> "Here, according to the complaint, the roof was wet and slippery, due to which plaintiff fell. He was sent therefor the express purpose of stopping the flow of water through the skylight, and the wet condition of the roof was, of course, obvious. As a matter of common experience he must have known that this condition would probably render the surface slippery and a source of danger (*Peterson v. American Ice Co.,* 83 N. J. L. 579 (83 Atl. 872, 47 L. R. A. (N. S.) 144).) While the degree of care required remains constant the acts necessary to constitute such care may vary according to circumstances (*Henderson v. Los Angeles Traction Co.,* 150 Cal. 689 (89 Pac. 976)), and a reasonably prudent man under the circumstances alleged would have foreseen the possibility of injury from the condition described and used care in proportion to the danger. By the use of such care, namely, ordinary care, any injury to appellant due to the slippery condition of the roof could have been avoided."

Assume that in the case just cited the plaintiff had alleged that he was fully aware of the hazard of slipping and falling through the skylight. Assume that inside the building the defendant had permitted some sharp object or objects to be directly underneath the skylight and that the plaintiff had no knowledge of their presence. Could it be asserted that merely because he had no knowledge of the presence of such objects underneath the skylight, that his antecedent conduct in attempting to work in proximity to the skylight on the slippery footing, was not a contributing factor to his ultimate injuries? Appellant

thinks not, and can see no distinction between the illustration given and the Appellee's contentions in the case at bar.

Conclusion.

It is respectfully contended that the Appellant has sustained his burden of demonstrating that the judgment entered in favor of the Appellee was a miscarriage of justice, and that the evidence was insufficient to support the findings of fact, conclusions of law and judgment, and that the Appellant was not guilty of any actionable negligence, and that in any event the Appellee was guilty of negligence which as a matter of law proximately contributed to his own injury. The judgment in favor of Appellee should be reversed.

Respectfully submitted,

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HENRY E. KAPPLER,
Attorneys for Appellant.

No. 14970

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FURUKAWA,

Appellant,

vs.

YOSHIO OGAWA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

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APPELLEE'S REPLY BRIEF.

The statement of the case in Appellant's Opening Brief is incomplete. Appellee hereby restates the facts. All emphasis in this brief is added.

Statement of the Case.

At the time of the accident out of which this action arose, September 5, 1953, Appellee was a gardener and Appellant owned a dump yard. Appellee paid an agreed amount of money to Appellant for right to dispose of refuse in Appellant's dump yard. [Tr. p. 15.]

Appellant had excavated a pit in his dump yard in which he parked a large stake truck. The pit was bordered on three sides by a cement retaining wall, the top of which extended approximately one foot above the ground. The border of the cement retaining wall was approximately 18 inches wide. When the truck was parked in the pit, the

sides of the truck extended approximately two feet above the top of the retaining wall and there was a distance of 12 to 18 inches between the sides of the truck and the sides of the retaining wall.

Prior to September 5, 1953, a tractor had damaged Appellant's truck, breaking the metal band surrounding the bed of the truck. After said damage to Appellant's truck, a jagged metal hook, between 4 and 5 inches long and between 2 and 3 inches wide, extended outward and upward from the outside edge of the bed of the truck. [Tr. pp. 47, 106.]

Both Appellant and at least one of his employees knew of the protruding metal hook at the time of said damage and thereafter. [Tr. pp. 92, 105 and Pltf. Ex. 4.] Prior to Appellee's accident, Appellant's employee had slipped from the cement edge surrounding the pit, and had observed another person slip therefrom. [Tr. pp. 110, 111.]

On the day of the accident, Appellee had entered Appellant's dump yard for the purpose of disposing of refuse. As was customary, Appellee stood on the top of the cement retaining wall while throwing his refuse into Appellant's truck which was backed into the pit. Appellee threw his first bundle of trash toward the middle of the truck. No difficulty was encountered. Appellee then threw a second bundle of trash toward the rear of the truck. The second bundle was not as heavy as the first bundle. [Tr. pp. 85, 86.]

At no time while disposing of his trash did Appellee see the protruding metal hook at the base of the truck which was several feet below the top of the retaining wall. [Tr. p. 46.] Appellant had not told Appellee about the damage to his truck nor about the protruding metal hook. [Tr. p. 93.]

As Appellee attempted to dispose of his second load of trash, he slipped on refuse on top of the cement edge of the retaining wall and fell between the truck and the

pit. As he fell, the protruding metal hook impaled Appellee's right leg and caused the injury out of which this action arose. [Tr. pp. 46, 105.]

The only injury sustained by Appellee was that caused by the impaling of his right leg on the metal hook. There was no injury caused by any other part of the truck or by the pit. [Tr. pp. 70-77.]

Based upon the above facts, the Trial Court found as follows:

1. That other than said metal hook, the sides of said truck did not contain protruding objects, except for small sized bolt heads and nuts. [Finding 7, Tr. p. 28.]

2. That Appellee had no knowledge of said metal hook; that Appellee could not see and could not have seen said projecting metal hook from the top of the retaining wall; and that Appellee was not warned of said hazard by Appellant. [Finding 9, Tr. p. 29.]

3. That the hazard of being impaled upon a metal hook was not known to Appellee and could not have been reasonably foreseen by him. [Finding 8, p. 29.]

4. That the hazard of persons in the position of Appellee of being impaled upon said metal hook was known to Appellant and was reasonably foreseeable by him. [Finding 8, Tr. p. 29.]

After having so found, the Trial Court made the following Conclusions of Law:

1. That Appellee was a business guest and business invitee of Appellant. [Tr. p. 31.]

2. That Appellant owed Appellee the duty of due care, the duty to warn Appellee of hidden danger and the duty to warn Appellee of the hazard of said projecting metal hook. [Tr. p. 31.]

3. That Appellant should have reasonably foreseen that Appellee and others similarly using said dump might

fall into said pit and receive serious injury by reason of said projecting metal hook. [Tr. p. 31.]

4. That Appellee was not contributorily negligent with respect to the hazard created by said projecting metal hook known to Appellant but unknown to Appellee and unforeseeable by Appellee in the exercise of reasonable care. [Tr. p. 31.]

Province of Court of Appeals.

Where the evidence is conflicting, or, if undisputed, the facts are such that fair minded men may draw different conclusions, the determination of negligence and contributory negligence are questions for the trier of fact.

> *Douglass v. Douglass,* 1955, 130 Cal. App. 2d 609, 279 P. 2d 556;
>
> *United States v. Douglas Aircraft Co.,* 169 Fed. 2d 755, 757 (9th Cir. 1948).

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."
>
> Rule 52 (a), Fed. Rules of Civil Procedure, 28 U. S. C. A.

In *Glens Falls Indemnity Co. v. United States,* 229 Fed. 2d 370 (9th Cir. 1955), this Court stated on page 373 as follows:

> "Findings of fact by the trial court are presumptively correct and will not be set aside unless clearly erroneous. F. R. Civ. P. Rule 52 (a), 28 U. S. C. A. An appellant's mere challenge of a finding does not cast the onus of justifying it on this court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are *clearly* erroneous."

ARGUMENT.

I.

The Evidence Is Clearly Sufficient to Sustain the Finding That Appellant Was Negligent and That Appellant's Negligence Was the Proximate Cause of Appellee's Injury.

It is conceded that Appellee was a business invitee upon Appellant's property.

Appellee, as an invitee, had the right to assume that Appellant's premises were reasonably safe.

> *Popejoy v. Hannon,* 1951, 37 Cal. 2d 159, 171, 231 P. 2d 484.

Appellant is liable for failure to warn his invitees of a dangerous condition upon his premises, the existence of which Appellant knew or should have known.

> *Popejoy v. Hannon, supra;*
>
> *Raber v. Tumin,* 1951, 36 Cal. 2d 654, 226 P. 2d 574;
>
> *Blumberg v. M & T Inc.*, 1949, 34 Cal. 2d 226, 209 P. 2d 1;
>
> *Douglass v. Douglass, supra;*
>
> *Powell v. Jones,* 1955, 133 Cal. App. 2d 601, 284 P. 2d 856.

In *Powell v. Jones, supra,* the Court stated on page 606:

> "A possessor of land owes to an invitee the duty of exercising ordinary care to keep his premises in a reasonably safe condition; and he will be liable for bodily harm, in the absence of an adequate warning, caused an invitee by a dangerous condition in the premises 'if he knows or should know of the

> danger which he has no basis for believing that the invitee will discover.' "

Appellant cites cases on pages 13 and 14 of his Opening Brief in support of the contention that an invitor has no duty to warn an invitee of obvious defects. In *Anderson v. Western Pacific R.R. Co.,* 1936, 17 Cal. App. 2d 244, 61 P. 2d 1209, cited by Appellant, which did not involve an invitee, the defect was obvious. The Court stated on page 249 as follows :

> "On the contrary, the evidence without conflict proves that there was no concealment or trap whatever."

With the general proposition that an invitor owes no duty to warn of obvious defects, Appellee has no quarrel.

However, in the instant case, the protruding metal hook was *not* obvious, *but was instead concealed and hidden from discovery by Appellee while he was standing on top of the walls of the pit.* It was with respect to this hazard that Appellant had the duty to warn Appellee. The Trial Court so found.

On page 7 of his Opening Brief, Appellant argues that the evidence was insufficient to justify the conclusion that he could have anticipated that anyone would fall between the truck and pit and be injured by the protruding metal hook.

However, appellant's employee, whose duty it was to keep clean the area around the pit, had previously observed persons slipping from the top of the retaining wall. [Tr. pp. 110, 111.]

This knowledge of said employee that persons had slipped from the top of the pit was imputed to Appellant.

Maron v. Swig, 1952, 115 Cal. App. 2d 87, 251 P. 2d 770;

Cooke v. Mesmer, 1912, 164 Cal. 332, 128 Pac. 917;

California Civil Code, Sec. 2332.

Moreover, the mere fact that similar accidents may not have been brought to Appellant's attention did not necessarily make his conduct innocent.

Alaska Freight Lines v. Harry, 220 F. 2d 272, 275-276 (9th Cir. 1955);

Teale v. Southern Pacific Rwy. Co., 1913, 20 Cal. App. 570, 129 Pac. 949;

Rocca v. Tuolumne County Elec. Power & Light Co., 1926, 76 Cal. App. 569, 245 Pac. 468;

Cox v. Central California Traction Co., 1927, 85 Cal. App. 596, 259 Pac. 987.

In the *Alaska Freight Lines* case, this Court stated on page 276 as follows:

> ". . . Merely because a particular accident has not happened before does not render it of that class which may not be 'reasonably anticipated'; for if, in the conduct of a certain business it should be known that unusual or uncommon danger . . . must necessarily coexist with certain conditions, responsibility attaches for a failure to control such conditions."

Whether it was foreseeable that injury would result to an invitee by virtue of the hazard of the protruding metal hook was a question of fact for the Trial Court to determine. Appellant knew of the existence of the metal hook. Appellant knew that persons had slipped from the top of the pit while disposing of refuse. Appellant knew

or should have known that persons disposing of trash into the truck parked in the pit could not discover the existence of the metal hook. From these facts the Trial Court could have inferred that Appellant should have foreseen risk of injury from the hazard of the protruding metal hook. Thus, the evidence clearly supports the Trial Court's finding of negligence.

Furthermore, it was for the Trial Court to determine proximate cause.

> *Orr v. Southern Pacific Co.,* 226 F. 2d 841, 843 (9th Cir. 1955).

In the instant case, the only injury sustained by plaintiff was caused by being impaled on the protruding metal hook. No other part of the truck or pit caused injury. [Tr. pp. 70-77.] Therefore, the trial Court's finding that Appellant's negligence was the proximate cause of Appellee's injury is also clearly supported by the evidence.

II.

The Evidence Is Clearly Sufficient to Sustain the Finding That Appellee Was Not Guilty of Contributory Negligence.

The evidence disclosed and the Trial Court found that Appellee was injured by being impaled upon the protruding metal hook, that the hazard of said metal hook was unforeseen and unforseeable by Appellee and that with respect to said hazard Appellee was not contributorily negligent.

A plaintiff is not guilty of contributory negligence with respect to injuries caused by an unforeseen and unforeseeable hazard.

> *Hawthorne v. Gunn,* 1932, 123 Cal. App. 452, 11 P. 2d 411;

James v. Pennsylvania R.R. Co., 101 Fed. Supp. 241 (W. D. Pa. 1941) Aff'd 196, F. 2d 1021 (3rd Cir. 1952);

Kinderavich v. Palmer, 1940, 127 Conn. 85, 15 A. 2d 83;

Hassett v. Palmer, 1940, 126 Conn. 468, 12 A. 2d 646;

Cosgrove v. Shusterman, 1942, 129 Conn. 1, 26 A. 2d 471;

Kryger v. Panaszy, 1937, 123 Conn. 353, 195 Atl. 795;

Restatement of Torts, Secs. 281, 468;

Prosser on Torts, 1941, pp. 396, 397.

This is the application of the doctrine of foreseeability as an element of negligence and contributory negligence.

See:

Alaska Freight Lines v. Harry, 220 F. 2d 272 (9th Cir. 1955).

Restatement of Torts, Sec. 281 sets forth the elements of a cause of action for negligence. Comment e. discusses foreseeability as follows:

> "Risk of particular harm. Certain forms of conduct are negligent because they tend to subject certain interests of another to a particular hazard or type of hazard or to a limited number of hazards of a definite character. If so, the actor's negligence lies in his subjecting the other to the particular hazard and he is liable only for such harm as results from the other's exposure thereto."

The same rule is applicable in determining whether a plaintiff is contributorily negligent. Restatement of Torts, Section 468 sets forth the rule as follows:

> *"The fact that the plaintiff has failed to exercise reasonable care for his own safety does not bar recovery unless the plaintiff's harm results from a hazard because of which his conduct was negligent."*

Comment a. states:

> "The rule stated in this Section applies to the plaintiff's responsibility for his own carelessness, the same rule which is applied in Comment e. of Sec. 281, to the determination of the responsibility of a negligent defendant for harm resulting to a plaintiff. *Therefore, one whose act is negligent only because it should be recognized as likely to subject him to a particular hazard is not, as plaintiff, barred from recovery for an injury which results otherwise than from his exposure to this hazard."*

In *James v. Pennsylvania R.R. Co., supra,* plaintiff was advised by his doctors to stop working as a sandblaster because of danger of sinus injury. Plaintiff disregarded the advice and subsequently contracted silicosis. The Court held that, under the circumstances, plaintiff could not have reasonably foreseen the risk of contracting silicosis and therefore was not contributorily negligent, stating on page 242 as follows:

> "I perceive no error in refusing to charge that it was negligence for plaintiff to engage in sandblasting after receiving medical advice not to do so . . . the medical advice was based upon a diagnosis of sinusitis. The disease on account of which plaintiff here seeks recovery was silicosis, as to which the doctors did not purport to counsel plaintiff. Dis-

obedience of their recommendations would not create in the mind of a reasonably prudent man the risk of contracting silicosis. See Restatement of Torts, 1934 Ed., Sec. 468, Comment a."

In *Kinderavich v. Palmer, supra,* the Court stated on page 89 as follows:

". . . an act or omission of a plaintiff will not debar him from a recovery where it did not constitute negligence as regards the hazard from which his injuries resulted."

Prosser states on pages 396 and 397 as follows:

"The accepted view now is that *the plaintiff's failure to exercise reasonable care for his own safety does not bar his recovery unless his injury results from the particular risk to which his conduct has exposed him.* In a leading Connecticut case, in which a workman violated instructions not to work on the unguarded end of a slippery platform, and was injured by the fall of a brick wall, it was held that he might recover, since his negligence did not extend to such a risk. Upon the same basis, it has been held that a passenger riding upon the platform of a street car is not negligent with respect to a collision, nor is an automobile driver who parks near a fire hydrant negligent as to any vehicle which may drive into him, except a fire engine, or one who drives at excessive speed negligent as to a tree which falls on him."

In the instant case, the hazard of the projecting metal hook was unknown and unforeseeable by Appellee. Therefore, with respect to said hazard, Appellee was not contributorily negligent.

Had Appellee's injuries been caused by another hazard, then with respect to that hazard Appellee might have

been contributorily negligent. However, because Appellee's injuries were caused by the unforseeeable metal hook, there is no need to speculate as to other possibilities.

Appellant attempts to dismiss the rule of foreseeability in three ways:

First: Appellant argues on page 20 of his Opening Brief that Appellee "may well have been contributorily negligent with respect to his conduct in permitting himself to slip or fall from the top of the cement wall."

However, this argument overlooks the fact that conduct can be negligent *only with relation to a particular hazard.* In the instant case, the hazard was the protruding metal hook. With respect to this hazard, the Trial Court found that Appellee was not contributorily negligent.

There is no such thing as negligence in the air. As stated in *Palsgraf v. Long Island R.R. Co.,* 1928, 248 N. Y. 339, 162 N. E. 99:

> "We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act, and therefore of a wrongful one, irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers only, because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. *The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation*; it is risk to another or to others within the range of apprehension. . . ."
>
> *"Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all."*

Accordingly, it was for the Trial Court to determine whether Appellee's conduct in permitting himself to slip from the top of the cement wall was contributory negligence with relation to the hazard of the protruding metal hook.

Second: Appellant states on page 22 of his Opening Brief that: "It is not necessary that the precise injury or hazard must have been in the mind of Appellee . . . to establish contributory negligence."

Appellant has confused the question of foreseeability of *injury* with foreseeability of *hazard*. There is no issue in the instant case with respect to the former. Moreover, Appellant cites no authority in support of his novel proposition that foreseeability of hazard is not an element of negligence or contributory negligence.

By this argument, Appellant has placed himself squarely on the horns of a dilemma. On one hand, he urges that foreseeability of hazard *is not* an element of contributory negligence. On the other hand, he argues that foreseeability of hazard *is* an element of negligence. Appellant states on page 7 of his Opening Brief that:

> "There is no evidence to justify the conclusion that the Appellant could possibly have *anticipated* that anybody using the pit would fall in the small space between the edge of the pit and the side of the truck in such a manner as to come in contact with the small piece of metal which was protruding from the side of the truck. This tiny area was not one in which the Appellant *could reasonably have anticipated* that any person would fall or otherwise be involved."

In truth, an essential element of both negligence and contributory negligence is whether the hazard causing the

injury was foreseeable. Appellant should have foreseen that persons in the position of Appellee might sustain injury by virtue of the projecting metal hook and thus was negligent. On the other hand, the hazard of the metal hook was unforeseeable to Appellee. Therefore, with respect to said hazard, Appellee's conduct did not constitute contributory negligence.

Finally: Appellant argues on page 16 of his opening brief that Appellee's conduct "was the sole proximate cause of his injuries."

No Question of Proximate Cause With Respect to Appellee's Conduct Exists in the Instant Case.

In determining the right to recover for negligence, the Trial Court must determine whether plaintiff was guilty of contributory negligence. Only if plaintiff was so guilty, must the Trial Court find whether plaintiff's contributory negligence was a proximate cause of his injury.

If plaintiff is not guilty of contributory negligence, then no question of proximate cause arises and his right to recover is not barred.

Palsgraf v. Long Island R.R. Co., supra;
Cosgrove v. Shusterman, supra;
Kinderavich v. Palmer, supra;
California Jury Instructions, Civil, 4th Ed., 1956, No. 113.

In the *Palsgraf* case, Justice Cardozo stated as follows:

> "The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. *If there is no tort to be redressed, there is no occa-*

sion to consider what damage might be recovered if there were a finding of a tort."

Prosser on Torts states as follows on page 397:

"Such cases frequently say that the plaintiff's negligence is not the 'proximate cause' of his own damage. It is, of course, quite possible that his conduct may not have been a substantial contributing factor at all, where the harm would have occurred even if he had exercised proper care. But in the usual case the causal connection is clear and beyond dispute, and no problem of causation is involved. *What is meant is that the plaintiff's conduct has not exposed him to any foreseeable risk of the particular injury through the defendant's negligence, and therefore is not available as a defense."*

California Jury Instructions, Civil, Fourth Edition, 1956, No. 113, sets forth the California rule that if the plaintiff is not contributorily negligent, no question of proximate causes exists as follows:

"The issues to be determined by you in this case are these:

"First: Was the defendant negligent?

"If you answer that question in the negative, you will return a verdict for the defendant. If you answer it in the affirmative you have a second issue to determine, namely: Was that negligence a proximate cause of any injury to the plaintiff?

"If you answer that question in the negative, plaintiff is not entitled to recover, but if you answer it in the affirmative, you then must find on a third question:

"Was the plaintiff negligent?

"If you find that he was not, after having found in plaintiff's favor on the other two issues, you then

must fix the amount of plaintiff's damages and return a verdict in his favor.

"If you find that plaintiff was negligent, you must then determine a fourth issue, namely: Did that negligence contribute as a proximate cause of the injury of which the plaintiff here complains?"

Accordingly, no issue of proximate cause with relation to Appellee's conduct exists because the Trial Court found that Appellee was not guilty of contributory negligence.

Conclusion.

Appellant has placed himself in an untenable position. In the first half of his Opening Brief, he argues that he was not negligent because it was unforeseeable that injury would result from the hazard of the protruding metal hook. The Trial Court found that risk of injury was in fact foreseeable by Appellant, and therefore Appellant was negligent.

In the second half of his Opening Brief, Appellant argues that he is not liable because foreseeability of hazard is not to be considered in determining whether Appellee was contributorily negligent. The Court held, in accordance with the authorities cited herein and with the general law of negligence, that foreseeability is an element of contributory negligence and that Appellee was not guilty thereof because the hazard of the metal hook was unforeseeable by him.

Accordingly, the Trial Court's findings are supported by law and evidence and the judgment should be affirmed.

Respectfully submitted,

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No. 14970.

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APPELLANT'S REPLY BRIEF.

Appellee's statement of the case adds nothing of value to the original statement by Appellant. Appellee bravely asserts that "as Appellee attempted to dispose of his second load of trash, he slipped on refuse on top of the cement edge of the retaining wall and fell between the truck and the pit." (Reply Br. pp. 2-3.) Two transcript references (pp. 46-105) are given, but neither of them support the quoted statement. The true facts with reference to the fall and its cause are fully set forth in the Opening Brief where Appellee clearly testified as to the cause of his fall.

> "Q. There was nothing on which you were standing that caused you to slip, then, was there? A. Well,

my testimony is that *because I had to pull harder* my feet slipped and then went forward. * * *

Q. Now on what did you slip? A. I think it was because I pulled hard." [Tr. pp. 87-88.]

That the *cause* of Appellee's *fall* is clearly established as being unrelated to any negligent conduct on the part of Appellant appears from a reading of the Reply Brief where it is asserted that the maintenance of the piece of broken metal on the truck body was a "trap." Appellee concedes as he must, the proposition that *an invitor owes no duty to warn an invitee of obvious defects or dangers* (Reply Br. p. 6), but courageously asserts that the protruding piece of metal was not obvious, thus the rule enunciated by a host of California cases is inapplicable.

Appellee is clearly in error. For example, assume an open unguarded excavation 20 feet wide, in broad daylight. A plaintiff inattentively falls in the excavation. Could it possibly be asserted that the person who maintained the excavation could be held liable because plaintiff struck a plank at the bottom of the ditch which had a protruding nail, but that there would be no liability if plaintiff merely injured himself by striking the ground at the bottom of the ditch? Appellant thinks not. As Appellant has already pointed out, the *hazard* was that of *falling into the pit.* The danger of injury from a fall into the pit would be apparent to *anyone.* Appellee clearly did not intend to fall into the pit. No one expected that Appellee or anyone else would attempt to use the area between the edge of the pit and the truck body and there is not one scintilla of evidence in the record to justify such a conclusion. That Appellee hit the projecting piece of metal was *mere happenstance,* nothing more.

The case must be governed by the well settled principles laid down by the many cases cited in the Appellant's Opening Brief, particularly *Blodgett v. Dyas Co.,* 4 Cal. 2d 511 and others as set forth in Opening Brief, page 13. In the *Blodgett v. Dyas Co.* case, 4 Cal. 2d 511, the plaintiff fell down an open stair well. It was held that as a matter of law there was no liability. Under Appellee's theory, if the plaintiff had fallen down the *same* open stair well which had at the bottom thereof an object which might conceivably have caused injury, there would be liability. *Clearly such a result is ridiculous.*

It is respectfully submitted that as a matter of law the uncontradicted evidence established that Appellee by his own conduct *pulled too hard* on his gunny sack and unintentionally fell into the pit, and that his injuries were not the result of any negligence on the part of Appellant. That in any event reasonable minds could not differ on the proposition that Appellee's own conduct contributed proximately to his injuries.

The evidence does not support the findings and the judgment should be reversed.

Respectfully submitted,

HENRY E. KAPPLER, and
JOHN Y. MAENO,
Attorneys for Appellant.

No. 14,971

IN THE

United States Court of Appeals

For the Ninth Circuit

LEUN GIM,

Appellant,

vs.

HERBERT R. BROWNELL, JR., Attorney General of the United States, and BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco, California,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney.
CHARLES ELMER COLLETT,
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Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,971

IN THE

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Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

The appellant claims birth in China (Br. p. 1) and citizenship in the United States by way of naturalization (Tr. p. 1). He alleges that upon the representations made in affidavits filed with the American Consul at Hong Kong, a travel document was issued to the alleged wife and four children of the appellant and they were permitted to travel to the United States to apply to the Immigration and Naturalization Service for admission to the United States as the wife

and children of the appellant (Tr. p. 3). They apparently arrived at the port of entry San Francisco on October 14, 1947.

In paragraph VII of the complaint (Tr. p. 4) appellant alleges "That the findings of *the* hearing by the Board of Special Inquiry ordering the above named children of the plaintiff excluded from the United States were adopted on July 21, 1948 by the Commissioner of the Immigration and Naturalization Service."

Although not alleged, a reasonable inference is that a hearing was had before the Board of Special Inquiry in accordance with applicable law and regulations, and that an appeal was taken from the ruling of the Bord of Special Inquiry to the Board of Immigration Appeals, and that the ruling of the Board of Special Inquiry was sustained and the appeal dismissed.

Appellant alleges in paragraph VIII of the complaint (Tr. p. 4) "That the above named said four (4) children of the plaintiff, Leun Gim, were duly excluded and deported on the grounds that they were not the natural and legal children of the plaintiff . . ." From this allegation it is reasonable to infer that no attempt was made to obtain judicial review of the final decision of the Immigration and Naturalization Service and that the said four children having been excluded, returned to China. Appellee filed a motion to dismiss the complaint, calling the court's attention to an identical complaint filed by appellant on June 3, 1952 (No. 31583) in the same court. Action No. 31583

was dismissed on June 14, 1954 and no appeal was taken from the order of dismissal.

JURISDICTION.

Appellant in his brief has made no attempt to meet the jurisdictional question. In the section of his brief entitled "Jurisdictional Statement" he has made reference to the general jurisdiction of the Appellate Court to review judgments of the District Court (28 U.S.C.A. 1291 and 1292).

QUESTION PRESENTED.

Appellee fails to discover any question presented.

The statement of points cites error in the trial court in dismissing the complaint for want of jurisdiction and failure to state a claim.

ARGUMENT.

Appellant has cited and quoted the pertinent provisions of Public Law 271, 79th Congress, 54 Stat. at 659. He admits acting timely in making application under said statute (Par. VI, Tr. p. 3). The State Department, through the American Consul at Hong Kong, received the application and granted permission to the persons mentioned in the application to travel to the United States to apply for admission

to the Immigration and Naturalization Service (Par. VI, Tr. p. 3).

Appellant and the persons who claimed to be his wife and children, the same persons named in the complaint herein, failed to establish the claimed relationship to appellant and they were excluded. After the appeal to the Board of Immigration Appeals was dismissed they all returned to China.

The argument of appellant is short. On page 4, line 3 of the brief, he says:

> "The benefits, privileges and rights * * * accrued to the children * * * by virtue of this 'Statute' "

but in the next sentence he opines:

> "The children and wife of the father (appellant) could not be said to have acquired any rights under the statute, because of the failure of the father * * *."

He then concludes in a new paragraph beginning line 12:

> "We therefore must conclude that the appellant acquired a right by virtue of the 'Statute' to bring his children to the United States."

This conclusion goes back to the beginning of the argument which quotes the statute and says:

> "The appellant acted timely, and the four (4) children and wife made their application before the United States Immigration and Naturalization Service for admission on 14 October 1947."

In line 20 appellant poses a question although there is no question mark at the end. We believe the "can"

and "we" should be transposed so the sentence begins "We can therefore contend that the rights of the appellant arising by virtue of the Statute were summarily cut off only by reason of the appellee's conduct in deporting the appellant's children."

Appellant does not state that he does so contend. Neither does he clarify the contention nor support it with authority.

Knauff v. Shaughnessy, 338 U.S. 537.

The matter presented on page 5 of the brief discloses no justiciable issue as to the appellee and no issue as to any rights of appellant or his alien spouse and children. The persons he named were permitted to come forward but were unable to establish their claims and so were deported.

The gist of appellant's argument under (2) on page 5 is that the complaint states a cause because it states a cause.

The identical complaint was the subject of action No. 34615. Judge Carter afforded plaintiff, appellant herein, full opportunity to direct the court's attention to some authority (Tr. p. 2). This he failed to do. No appeal was taken from the order of dismissal of June 14, 1954. Appellant having failed to appeal from the first action, filed a complaint instituting the same claims as a new cause of action. The final order in action No. 34615 is *res judicata.*

United States v. California, 192 U.S. 355;

Baltimore S. S. Co. v. Phillips, 274 U.S. 316.

CONCLUSION.

Appellee submits the appeal herein is without merit, is frivolous and should be dismissed.

Dated, San Francisco, California,
July 3, 1956.

LLOYD H. BURKE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellee.

No. 14973

United States
Court of Appeals
for the Ninth Circuit

CLARENCE V. WATSON, Appellant,

vs.

WOODROW C. BUTTON, Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —2-1-56

No. 14973

United States
Court of Appeals
for the Ninth Circuit

CLARENCE V. WATSON, Appellant,

vs.

WOODROW C. BUTTON, Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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STANLEY J. MITCHELL,

101 Hogg Building,
Oregon City, Oregon,

For Appellant.

CRAWFORD & WILLNER,
DON S. WILLNER,

Corbett Building,
Portland, Oregon,

For Appellee.

In the District Court of the United States for the District of Oregon

No. 7686-Civil

WOODROW C. BUTTON, Plaintiff,

vs.

CLARENCE V. WATSON, Defendant.

COMPLAINT

Comes now the plaintiff and for his first cause of suit against the defendant complains and alleges as follows:

I.

Plaintiff is a citizen, resident and inhabitant of the State of Washington and defendant is a citizen, resident and inhabitant of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

That on May 29, 1951, plaintiff and defendant purchased all of the stock of Highway Freight, Inc., an Oregon corporation, engaged in the business of a motor carrier for hire.

III.

That 49½ shares of stock of said corporation were issued to plaintiff and 49½ shares of stock of said corporation were issued to defendant and 1 share of stock of said corporation was issued to Earle V. White, Jr., who had no beneficial interest in said corporation.

IV.

That at a special meeting of the stockholders of said corporation upon May 29, 1951, plaintiff and defendant and Earle V. White, Jr., were duly elected directors of said corporation.

V.

That at a meeting of the board of directors of said corporation on May 29, 1951, defendant was duly elected president-treasurer of said corporation with the duties of general manager and with the full time care of the general business matters of the corporation.

VI.

That from May 29, 1951, until July 20, 1954, defendant was the duly elected and qualified president-treasurer of said corporation with the duties of general manager and with the full time care of the general business matters of said corporation.

VII.

That defendant in the full time conduct of the general business matters of said corporation owed a fiduciary duty to plaintiff.

VIII.

That all of the stock of the corporation was sold on July 20, 1954, by plaintiff and defendant and Earle V. White, Jr. and as part of the sale, the purchasers agreed to release and discharge defendant from any claims and demands existing against him in favor of the corporation.

IX.

That defendant during the period May 29, 1951, until July 20, 1954, misappropriated the funds of said corporation. That some of the instances of said misappropriation are as follows:

During the period December 1, 1953, through June 15, 1954, there was $183.75 cash recorded as received by Highway Freight, Inc., but not deposited in the bank account of the corporation. The dates, amounts and payors are as follows:

January 20, 1954; amount $30.00; payor A. E. Lehman.

February 1, 1954; amount $5.00; payor Les Boyd.

March 20, 1954; amount $50.00; payor L. M. Boyd.

April 5, 1954; amount $23.75; payor Unknown.

April 15, 1954; amount $75.00; payor Portland Equipment Co.

Total amount $183.75.

During the period December 1, 1953, through June 15, 1954, there were checks in the amount of $2,990.32 recorded as received by Highway Freight, Inc. but not deposited. The dates and amounts and payors of these checks are as follows:

December 18, 1953; amount $192.85; payor Park Loading Company.

February 23, 1954; amount $157.03; payor Park Lumber Co.

March 2, 1954; amount $297.19; payor Park Lumber Co.

March 23, 1954; amount $28.43; payor A. Fisher.

March 16, 1954; amount $398.74; payor Park Lumber Co.

March 11, 1954; amount $95.35; payor Granning and Treese.

April 11, 1954; amount $43.03; payor Jack Harbert.

April 12, 1954; amount $72.50; payor Park Lumber Co.

April 7, 1954; amount $117.44; payor Granning and Treese.

May 18, 1954; amount $50.00; payor Tom Dunbar.

June 3, 1954; amount $110.00; payor Tom Dunbar.

June 7, 1954; amount $102.38; payor Tom Dunbar.

March 3, 1954; amount $70.04; payor H. R. Lee.

April 30, 1954; amount $387.28; payor Park Lumber Co.

May 21, 1954; amount $166.78; payor Lighthall and M.

June 7, 1954; amount $422.27; payor D. Knapp.

June 7, 1954; amount $107.72; payor M. & M. Logging Co.

June; amount $171.39; payor Composition unknown.

These checks were marked in the books as being taken by defendant, although there is no record of such amounts in the drawing account of the defendant.

X.

That plaintiff believes that an accounting would

reveal numerous other instances of misappropriation by the defendant.

XI.

That plaintiff does not know the amount of money by which defendant damaged plaintiff through his misappropriation, but plaintiff believes that it is in excess of $5,000.00.

XII.

That plaintiff discovered through investigation the misappropriation hereinbefore alleged after July 20, 1954.

XIII.

That plaintiff and defendant are now jointly responsible for the liabilities of Highway Freight, Inc. incurred previous to July 20, 1954, in the amount of approximately $65,000.00, and plaintiff alleges that part of these liabilities are due to the misappropriations of the defendant.

XIV.

That plaintiff has no speedy or adequate remedy at law.

For a second cause of suit against the defendant, plaintiff complains and alleges as follows:

I.

Plaintiff realleges all of the allegations contained in Paragraphs I through VIII of his first cause of suit and incorporates them with the same effect as if they had been fully set forth herein.

II.

That defendant during the period May 29, 1951, until July 20, 1954, mismanaged the affairs of Highway Freight, Inc. through willful neglect or gross negligence. That some of the instances of said mismanagement are as follows:

1. Permitting 10% per month penalty to accumulate on unpaid Oregon State Highway taxes and thereby constantly putting the corporation's Oregon Public Utilities Commission permit in constant jeopardy.

2. Permitting State of Washington Public Utilities Commission taxes to accumulate unpaid.

3. Permitting Federal Withholding taxes to accumulate unpaid.

4. Permitting State of Oregon Withholding taxes to accumulate unpaid.

5. Permitting Federal Old Age Benefit taxes to accumulate unpaid.

6. Permitting Federal Excise taxes to accumulate unpaid.

7. Permitting Federal Transportation taxes to accumulate unpaid.

8. Permitting State of Oregon Industrial Accident taxes to accumulate unpaid.

9. Permitting State of Oregon Unemployment taxes to accumulate unpaid.

10. Permitting Highway Freight, Inc. rig to be executed upon and kept off the road and out of productive use for at least a week upon a judg-

ment being obtained by Butlers Tire & Battery Co., Inc.

11. Turning current accounts receivable over to employees to collect to pay their own salaries thus harming the good will of Highway Freight, Inc.

12. Losing valuable and lucrative interchange rights with Okey's Trucking of Woodland, Washington, due to refusal to pay to Okey's Trucking its share of interchange business, refusal to keep proper books on interchange business and accepting of payments in the name of Highway Freight that should have been in the name of Okey's Trucking.

III.

That plaintiff believes that an accounting would reveal numerous other instances of mismanagement by the defendant.

IV.

That plaintiff does not know the amount of money by which defendant damaged plaintiff through his mismanagement, but plaintiff believes that it is in excess of $5,000.00.

V.

That plaintiff discovered through investigation the mismanagement hereinbefore alleged after July 20, 1954.

VI.

That plaintiff and defendant are now jointly re-

sponsible for the liabilities of Highway Freight, Inc. incurred previous to July 20, 1954, in the amount of approximately $65,000.00, and plaintiff alleges that part of these liabilities are due to the mismanagement of the defendant.

VII.

That plaintiff has no speedy or adequate remedy at law.

For a third cause of suit against the defendant, plaintiff complains and alleges as follows:

I.

Plaintiff realleges all of the allegations contained in Paragraphs I through VIII of his first cause of suit and incorporates them with the same effect as if they had been fully set forth herein.

II.

That defendant during the period May 29, 1951, until July 20, 1954, diverted corporate opportunities of Highway Freight, Inc. away from the corporation and to himself. That some of the instances of said diversion of corporate opportunities are as follows:

That for almost two years up to July 20, 1954, defendant personally has done motor carrier hauling for Park Lumber Co. of Estacada, Oregon. That said hauling has often been done with Highway Freight, Inc. vehicles and other equipment.

That defendant has informed plaintiff and plaintiff therefore believes that defendant cancelled an account receivable of Highway Freight, Inc. in return for a certain Diamond Tractor; that, thereafter, for many months previous to July 20, 1954, defendant proceeded to use said Diamond T Tractor for hauling, using other Highway Freight equipment and personnel to service said Diamond T Tractor and taking as his personal money all of the revenues obtained through the use of said Diamond T Tractor.

III.

That plaintiff believes that an accounting would reveal numerous other instances of diversion of corporate opportunities.

IV.

That plaintiff does not know the amount of money by which defendant damaged plaintiff through his diversion of corporate opportunities, but plaintiff believes that it is in excess of $5,000.00.

V.

That plaintiff discovered through investigation the diversion of corporate opportunities hereinbefore alleged after July 20, 1954.

VI.

That plaintiff and defendant are now jointly responsible for the liabilities of Highway Freight, Inc. incurred previous to July 20, 1954, in the amount of approximately $65,000.00, and plaintiff

alleges that part of these liabilities are due to the diversion of corporate opportunities by the defendant.

VII.

That plaintiff has no speedy or adequate remedy at law.

Wherefore, plaintiff prays for a judgment against the defendant as follows:

1. For an accounting of all sums due to plaintiff on account of defendant's misappropriation of the funds of Highway Freight, Inc.

2. For an accounting of all sums due to plaintiff on account of defendant's mismanagement of the affairs of Highway Freight, Inc. through willful neglect or gross negligence.

3. For an accounting of all of the sums due to plaintiff on account of defendant's diversion of corporate opportunities of Highway Freight, Inc. to himself.

4. For a judgment for such amounts so found to be due the plaintiff from the defendant.

5. For costs of suit.

6. For such other and further relief as to the Court may seem just and equitable.

CRAWFORD & WILLNER,
/s/ By DON S. WILLNER,
Of Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed Sept. 13, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION
(In Equity)

The defendant moves the court as follows, and each as a separate instance:

(1) To dismiss the suit for the reason that it appears on the face of the complaint herein that said complaint fails to state a claim against defendant upon which relief can be granted.

(2) To dismiss the suit for the reason that it appears on the face of the complaint herein that Highway Freight, Inc. is an indispensable party to this suit and has not been made a party to said complaint. The reason why Highway Freight, Inc. is an indispensable party is as follows: That in Paragraph VIII of plaintiff's first cause of suit, and which is re-alleged and re-affirmed in each succeeding cause, plaintiff has alleged "That all of the stock of the corporation was sold on July 20, 1954, by plaintiff and defendant and Earle V. White, Jr. and as part of the sale, the purchasers agreed to release and discharge defendant from any claims and demands existing against him in favor of the corporation."

(3) To dismiss the suit for the reason that it appears on the face of the complaint herein that Earle V. White, Jr. is an indispensable party to this suit and has not been made a party to said complaint. The reason why Earle V. White, Jr. is an indispensable party is as follows: That in Para-

graph III of plaintiff's first cause of suit, and which is re-alleged and re-affirmed in each succeeding cause, plaintiff has alleged "That 49½ shares of stock of said corporation were issued to plaintiff and 49½ shares of stock of said corporation were issued to defendant and 1 share of stock of said corporation was issued to Earle V. White, Jr., who had no beneficial interest in said corporation."

/s/ HARRY A. HARRIS,
Attorney for Defendant

To: Don S. Willner, of Attorneys for Plaintiff.

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at the United States Court House, City of Portland, Oregon, on the 18th day of October, 1954, at the hour of 10:00 a.m. in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ HARRY A. HARRIS,
Attorney for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 11, 1954.

[Title of District Court and Cause.]

MINUTE ORDER
October 18, 1954

Plaintiff appearing by Mr. Don S. Willner, of counsel, and the defendant by Mr. Harry A. Harris,

of counsel. Whereupon, this cause comes on to be heard upon the motion of the defendant to dismiss this cause, and the Court having heard the arguments of counsel, reserves its decision.

[Title of District Court and Cause.]

ANSWER

Comes now defendant and for answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits Paragraphs I, II, III, IV, V, VI and VIII of plaintiff's first cause of suit.

II.

Denies Paragraphs VII, XII and XIII of Plaintiff's first cause of suit, and each and every allegation, matter and thing therein contained, and the whole thereof.

III.

Answering Paragraph IX of plaintiff's first cause of suit, defendant denies misappropriating funds of said corporation between the dates alleged or at any other time, and as to the remaining allegations contained in Paragraph IX, defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth or falsity of said averments and therefore denies the same.

IV.

Answering Paragraph X of plaintiff's first cause

of suit, defendant denies that an accounting would reveal any misappropriation in this instance or any other instances.

V.

Answering Paragraph XI of plaintiff's first cause of suit, defendant denies the same and each and every allegation, matter and thing therein contained and the whole thereof, and denies specifically that defendant has misappropriated any sum of money whatsoever.

Comes now defendant and for answer to plaintiff's second cause of suit, denies, admits and alleges as follows:

I.

Re-affirms Paragraphs I, II, III, IV and V of defendant's answer to plaintiff's first cause of suit and incorporates the same with the same effect as though fully set forth herein.

II.

Answering Paragraph II of plaintiff's second cause of suit, defendant denies that he mismanaged the affairs of Highway Freight, Inc. through willful neglect or gross negligence or in any other manner between the periods therein alleged or at any other time.

Further answering Sub-paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Paragraph II of plaintiff's second cause of suit, defendant admits that during the period he was manager of the corporation that penalties accumulated on unpaid Oregon State

Highway taxes; that the Oregon Public Utilities Commission permit was in jeopardy; that State of Washington Public Utilities Commission taxes; Federal Withholding Taxes; State of Oregon Withholding Taxes; Federal Old Age Benefit Taxes; Federal Excise Taxes; Federal Transportation Taxes; State of Oregon Industrial Accident Taxes; State of Oregon Unemployment Taxes; and a judgment in favor of Butlers Tire & Battery Co., Inc. were for a period unpaid; and that defendant turned current accounts receivable over to employees to collect to pay their own salaries, all without fault or neglect on the part of defendant.

Answering Sub-paragraph 12 of Paragraph II of plaintiff's second cause of suit, defendant denies the same, and each and every allegation, matter and thing therein contained and the whole thereof.

III.

Answering Paragraph III of plaintiff's second cause of suit, defendant denies that an accounting would reveal any mismanagement in this instance or any other instance.

IV.

Answering Paragraph IV of plaintiff's second cause of suit, defendant denies any mismanagement on the part of defendant in any manner whatsoever, and specifically denies that plaintiff was damaged in the sum of $5,000.00 or in any other sum.

V.

Answering Paragraph V of plaintiff's second

cause of suit, defendant denies any mismanagement on the part of defendant at any time or at all.

VI.

Denies Paragraphs VI and VII of plaintiff's second cause of suit, and each and every allegation, matter and thing therein contained and the whole thereof.

Comes now defendant and for answer to plaintiff's third cause of suit, denies, admits and alleges as follows:

I.

Re-affirms Paragraphs I, II, III, IV and V of defendant's answer to plaintiff's first cause of suit, and incorporates the same with the same effect as though fully set forth herein.

II.

Answering Paragraph II of plaintiff's third cause of suit, defendant denies that he diverted corporate opportunities of Highway Freight, Inc. away from the corporation and to himself or to anyone else during the periods therein alleged or at any other time or at all.

Further answering Paragraph II of plaintiff's third cause of suit, defendant alleges that he did no personal motor carrier hauling for Park Lumber Company of Estacada, Oregon, during the period between May 29, 1951 and June 15, 1954, while defendant was performing the duties as manager of Highway Freight, Inc.

Further answering Paragraph II of plaintiff's

third cause of suit, defendant, as a portion of the consideration for a certain Diamond T Tractor, acquired in December, 1953, and believed to be one and the same as that contended for by plaintiff, cancelled an account receivable in the amount of $696.66 of Highway Freight, Inc. from one John McCracken, which amount was credited against defendant's delinquent salary account then due, owing and unpaid from said corporation to defendant. That thereafter defendant caused said Diamond T Tractor to be used when no other Highway Freight, Inc. equipment was available, and all charges of maintenance and operation of said Diamond T Tractor were charged against the earnings of said Tractor prior to distributing its earnings to defendant, and such is reflected in the books and accounts of Highway Freight, Inc.

III.

Answering Paragraph III of plaintiff's third cause of suit, defendant denies any diversion of corporate opportunities by defendant in this instance or any other instance.

IV.

Answering Paragraph IV of plaintiff's third cause of suit, defendant denies that defendant diverted any corporate opportunities and that plaintiff was damaged in the sum of $5,000.00 or in any other sum.

V.

That defendant denies that defendant diverted any corporate opportunities at any time.

VI.

Denies Paragraphs VI and VII of plaintiff's third cause of suit, and each and every allegation, matter and thing therein contained and the whole thereof.

VII.

Further answering plaintiff's complaint, defendant denies each and every allegation, matter and thing contained in plaintiff's complaint not herein admitted, contraverted, modified, qualified or specifically denied.

Comes now defendant and for a first, separate and distinct affirmative defense, alleges:

I.

That arising upon the face of the complaint herein, the facts alleged in said complaint are insufficient to state a claim upon which relief can be granted to plaintiff.

Comes now defendant and for a second, separate and distinct affirmative defense, alleges:

I.

That plaintiff during the time defendant was manager of Highway Freight, Inc. acted inequitably in respect to defendant and Highway Freight, Inc. as follows:

1. Drew a salary of $500.00 per month from June 1, 1951 until February, 1952, and thereafter the sum of $285.00 per month until August, 1953, from Highway Freight, Inc., while performing no services whatsoever for said corporation, and that during these periods the corporation reflected losses on its financial statements.

2. That plaintiff, who is also Vice-President of the Woodland State Bank, of Woodland, Washington, wherein the corporate bank accounts were kept; used his capacity in said bank to commit the following acts:

(a) Withdrew the sum of $2,000.00 from the corporate bank account and applied it on a note owing from the corporation to said bank, which act caused checks to return for want of sufficient funds; thereby damaging the credit of Highway Freight, Inc., and causing many of the instances alleged as mismanagement in Paragraph II of plaintiff's second cause of suit in plaintiff's complaint on file herein.

(b) Collected money due Highway Freight, Inc., from Okey's Trucking of Woodland, Washington and converted the same to his own use and benefit.

(c) Withdrew the sum of $200.00 from the personal account of defendant's wife for the payment of a note on a car without authorization from defendant or defendant's wife.

(d) Refused to allow defendant to pay wages to employees of Highway Freight, Inc. thus necessitating assigning accounts receivable to them.

3. Defendant is informed, believes and therefore alleges that plaintiff induced defendant while defendant was manager of the corporation to purchase two Mack Diesel Truck and Trailer units to haul lumber from a mill in which plaintiff had an interest at Gold Beach, Oregon, to Los Angeles, California, when said mill was in financial difficulty, and was forced to close down within ninety days, and that this was done for the purpose of sacrificing a lesser interest owned by plaintiff in Highway Freight, Inc. for a greater interest owned by plaintiff in said mill, by way of enhancing the sale value thereof.

4. That plaintiff constantly refused to give defendant the benefit of his advice upon various matters pertinent and necessary to the operation of Highway Freight, Inc., as a corporation, although defendant often requested the same.

II.

That by reason of the foregoing, plaintiff can not now be heard to complain of defendant before this honorable Court of Equity.

Comes now defendant and for a third, separate and distinct affirmative defense, alleges:

I.

That subsequent to the 1st day of January, 1954, a controversy existed between plaintiff and defendant over the defendant's methods of operating Highway Freight, Inc., an Oregon Corporation, or-

ganized and existing under and by virtue of the laws of the State of Oregon, principally owned by plaintiff and defendant, who were then the owners and holders of 49½ shares each of the capital stock of said corporation.

II.

That as a culmination of the controversy aforesaid, defendant on or about the 15th day of June, 1954, was removed as manager of said corporation.

III.

That thereafter and on or about the 20th day of July, 1954, and with full knowledge of all the facts, plaintiff and defendant entered into an agreement wherein plaintiff and defendant sold their interest and capital stock in Highway Freight, Inc. to Gilbert Kaer and Okey Hamrick, who are now the owners and holders of the beneficial shares of stock in said corporation. That as a portion of the consideration of said transfer, plaintiff and defendant agreed that Highway Freight, Inc., acting by and through its newly elected directors, would execute a full release from said corporation, to defendant, from any and all claims and demands of any kind existing against them or any of them in favor of the corporation.

IV.

That simultaneously with the transfer of the interest and capital stock as aforesaid, plaintiff entered into a collateral agreement wherein for and in consideration of defendant's transferring to

plaintiff a Diamond T Tractor and giving plaintiff authority to receive all monies due and owing to Highway Freight, Inc. on the accounts receivable and to disburse the funds and apply them on the accounts payable, plaintiff promised defendant to save defendant harmless on any and all liabilities thereafter arising against defendant in regard to defendant's operation of said corporation, and to pay to defendant the sum of $3,000.00, said sum being evidenced by a promissory note, more particularly described in defendant's fourth, separate and distinct affirmative defense by way of counter-claim, and that by reason of the premises the matters complained of in plaintiff's complaint on file herein have been fully compromised and settled.

Comes now defendant and for a fourth, separate and distinct affirmative defense by way of counter-claim, alleges:

I.

That on or about the 20th day of July, 1954, for good and valuable consideration, plaintiff made, executed and delivered to defendant his said promissory note in writing in words and figures as follows, to-wit:

$3,000.00 Portland, Oregon, July 20, 1954

For Value Received, I promise to pay to the order of Clarence V. Watson, at Portland, Oregon, Three Thousand ($3,000.00) Dollars in lawful money of the United States of America, with interest thereon

in like lawful money at the rate of Five (5) Per Cent per annum, from date until paid, payable in monthly installments, at the dates and in the amounts as follows:

One Hundred ($100.00) Dollars per month, which includes principal and interest, on or before the 20th day of July, 1954, and a like amount on or before the 20th day of each succeeding calendar month thereafter until both principal and interest have been paid;

Such monthly payments conditioned upon the maker receiving on or before the 15th day of the same month the above payments fall due, not less than Seven Hundred Fifty ($750.00) Dollars from Messrs. Okey Hamrick and Gilbert Kaer as their monthly payments on a contract of July 2, 1954, for the purchase of the stock of Highway Freight, Inc.; and in the event of the failure of the maker hereof to receive said monthly payment as due from Messrs. Kaer and Hamrick, the aforesaid payment of $100.00 per month due under this note will be delayed until such payment has been received from Messrs. Kaer and Hamrick, or one of them.

Therefore, if under the above conditions, said installments are not so paid, it is understood that the whole sum of both principal and interest do not become immediately due and collectible at the holder's option, but only become due and payable and collectible by the holder at his option in the event that the maker hereof has received the aforesaid monthly payment of not less than $750.00

from Messrs. Kaer and Hamrick, and fails to make the payment of $100.00 per month specified above. In case suit or action is instituted to collect this note or any portion thereof, I promise to pay such reasonable sum as the court may adjudge to be reasonable attorneys fees in such suit or action.

/s/ W. C. Button
Woodrow C. Button

II.

That the maker has received on or before the 15th day of the month when the above payments fall due his payments from Messrs. Kaer and Hamrick, as provided for in said note, and that demand has been made upon the plaintiff for the payment of said note, and the same has been refused, and there is now due, owing and unpaid on account thereof the sum of $3,000.00, together with interest thereon at the rate of 5 per cent per annum from the 20th day of July, 1954, until paid, and that defendant does now exercise his option and declare the whole sum now due and payable.

III.

That said note provides, among other things, in case suit or action is instituted to collect this note, or any portion thereof, plaintiff promised and agreed to pay in addition to the costs and disbursements provided by statute such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action, and that $450.00

is a reasonable sum to be allowed defendant as attorney's fees for the collection of this note.

Wherefore, Defendant having fully answered plaintiff's complaint, prays that said complaint be dismissed and that defendant be given judgment on his counter-claim in the sum of $3,000.00, together with interest thereon at the rate of 5 per cent per annum from the 20th day of July, 1954 until paid; for the further sum of $450.00 reasonable attorney's fees and for his costs and disbursements incurred herein.

/s/ STANLEY J. MITCHELL,
/s/ HARRY A. HARRIS,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed November 1, 1954.

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff and for reply to the defendant's counterclaim on file herein alleges as follows:

I.

That plaintiff signed the promissory note set forth in defendant's counterclaim due to the fraudulent misrepresentation of the defendant in that plaintiff would not have signed this note but for the

defendant's concealing the facts that he had misappropriated the money of Highway Freight Co., grossly mis-managed its affairs and diverted its corporate opportunities to himself, all as alleged in plaintiff's complaint.

II.

That said concealment was done willfully and knowingly by defendant with the intent that plaintiff should sign said note.

III.

That at the time plaintiff signed said note, he did not have knowledge of defendant's misappropriation, gross mismanagement and diversion of corporate opportunities.

IV.

That plaintiff signed this note in reliance on the fraudulent concealment and misrepresentations of the defendant.

V.

That plaintiff had a right to rely on the misrepresentation and fraudulent concealment of the defendant since defendant was the President of the company and in general charge of all its business matters, and was in charge of all books and records of said corporation.

VI.

That as a direct and proximate result of the misrepresentation of the defendant, plaintiff has been injured in the sum of $3,000.00, the value of said promissory note.

Wherefore, plaintiff prays that an order of this Court issue:

1. Denying defendant the relief prayed for in his counterclaim.

2. Cancelling said promissory note on the grounds of fraud.

3. For such other and further relief as to the Court may seem just and equitable.

CRAWFORD & WILLNER,
/s/ By DON S. WILLNER,
Of Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed December 17, 1954.

[Title of District Court and Cause.]

MINUTE ORDER OF THE COURT

Now at this day It Is Ordered that the motion of the defendant to dismiss the complaint filed herein be, and is hereby denied.

February 11, 1955.

[Title of District Court and Cause.]

ORDER

This matter having come on for hearing upon defendant's motion to dismiss and the Court having considered the memoranda submitted by the parties and being fully advised in the premises,

It Is Hereby Ordered, that defendant's motion to dismiss should be and hereby is denied.

Dated this 17th day of February, 1955.

/s/ GUS J. SOLOMON,
District Judge

[Endorsed]: Filed February 17, 1955.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on for pre-trial conference on the 31st day of May, 1955. The plaintiff appeared by one of his attorneys, Don S. Willner, and the defendant by one of his attorneys, Harry Harris. The parties with the approval of the Court agreed upon the following:

I.

Plaintiff is a citizen, resident, and inhabitant of the State of Washington and defendant is a citizen, resident, and inhabitant of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

That on May 29, 1951, plaintiff and defendant purchased all of the stock of Highway Freight, Inc., an Oregon corporation, engaged in the business of a motor carrier for hire.

III.

That 49½ shares of stock of said corporation were issued to plaintiff and 49½ shares of stock of said corporation were issued to defendant and one share of stock of said corporation was issued to Earle V. White, Jr., who had no beneficial interest in said corporation.

IV.

That at a special meeting of the stockholders of said corporation upon May 29, 1951, plaintiff and defendant and Earle V. White, Jr. were duly elected directors of said corporation.

V.

That at a meeting of the Board of Directors of said corporation on May 29, 1951, defendant was duly elected president-treasurer of said corporation with the duties of general manager and with the full-time care of the general business matters of the corporation; and did so act at all times from May 29, 1951, until July 20, 1954.

VI.

That all of the stock of the corporation was sold on July 20, 1954, by plaintiff and defendant and Earle V. White, Jr. and as part of the sale, the purchasers agreed to release and discharge defendant from any claims and demands existing against him in favor of the corporation.

VII.

That during the period defendant was president-

treasurer and general manager of the corporation 10% per month penalties accumulated on unpaid Oregon State highway taxes whereby constantly putting the corporation's Oregon Public Utilities Commission permit in constant jeopardy; that State of Washington Excise taxes, Federal Withholding taxes, State of Oregon withholding taxes, Federal Old Age Benefit Taxes, Federal Excise taxes, Federal Transportation taxes, and State of Oregon unemployment taxes accumulated unpaid. That a judgment in favor of Butler's Tire & Battery Co., Inc. was for a period unpaid which resulted in a Highway Freight, Inc. rig being executed on and kept off the road and out of productive use for at least a week. That current accounts receivable were turned over by defendant to employees to pay their own salaries.

VIII.

That on or about July 20, 1954, plaintiff made, executed, and delivered to defendant his promissory note in writing in words and figures as follows, to-wit:

$3,000.00 Portland, Oregon, July 20, 1954

For Value Received, I promise to pay to the order of Clarence V. Watson, at Portland, Oregon, Three Thousand ($3,000.00) Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of Five (5) Per Cent per annum, from date until paid, payable in monthly installments, at the dates and in the amounts as follows:

One hundred ($100.00) Dollars per month, which includes principal and interest, on or before the 20th day of July, 1954, and a like amount on or before the 20th day of each succeeding calendar month thereafter until both principal and interest have been paid;

Such monthly payments conditioned upon the maker receiving on or before the 15th day of the same month the above payments fall due, not less than Seven Hundred Fifty ($750.00) Dollars from Messrs. Okey Hamrick and Gilbert Kaer as their monthly payments on a contract of July 2, 1954, for the purchase of the stock of Highway Freight, Inc.; and in the event of the failure of the maker hereof to receive said monthly payment as due from Messrs. Kaer and Hamrick, the aforesaid payment of $100.00 per month due under this note will be delayed until such payment has been received from Messrs. Kaer and Hamrick, or one of them.

Therefore, if under the above conditions, said installments are not so paid, it is understood that the whole sum of both principal and interest do not become immediately due and collectible at the holder's option, but only become due and payable and collectible by the holder at his option in the event that the maker hereof has received the aforesaid monthly payment of not less than $750.00 from Messrs. Kaer and Hamrick, and failed to make the payment of $100.00 per month specified above. In case suit or action is instituted to collect this note or any portion thereof, I promise to pay such rea-

sonable sum as the Court may adjudge to be reasonable attorney fees in such suit or action.

/s/ W. C. Button
Woodrow C. Button

That plaintiff has received on or before the 15th day of the month when the above payments fall due his payments from Messrs. Kaer and Hamrick, as provided for in said note, and that defendant has made demand upon the plaintiff for the payment of said note and the same has been refused.

X.

Plaintiff and Defendant are now jointly responsible for the liabilities of said corporation incurred previous to July 20, 1954.

Plaintiff's Contentions

Plaintiff makes the following contentions applicable to each of the three causes of suit:

I.

That defendant in the full time conduct of the general business matters of said corporation owed a fiduciary duty to plaintiff.

II.

That plaintiff believes that an accounting would reveal numerous instances of misappropriation, mismanagement, and diversion of corporate opportunities by the defendant other than those specifically alleged, and plaintiff does not know the exact amount of money by which the defendant damaged

plaintiff through these instances, but plaintiff believes it would be in excess of $5,000.00 in each case.

III.

That Plaintiff discovered the facts hereinbefore alleged after July 20, 1954, through investigation.

IV.

That plaintiff and defendant are jointly responsible for the liabilities of Highway Freight, Inc., incurred previous to July 20, 1954, in the amount of approximately $65,000.00, and plaintiff contends that these liabilities are due to the misappropriation, mismanagement and diversion of corporate opportunities of the defendant.

V.

That plaintiff has no speedy or adequate remedy at law.

VI.

That the three causes of suit alleged in plaintiff's contentions do not accrue to the benefit of the present owners of Highway Freight, Inc. and the present owners have not been damaged by the actions of the defendants in the alleged three causes of suit. For his first cause of suit plaintiff contends as follows:

That defendant during the period May 29, 1951 until July 20, 1954, misappropriated the funds of said corporation. That some of the instances of said misappropriation are as follows:

During the period December 1, 1953 through June 15, 1954, there was $183.75 cash recorded as received by Highway Freight, Inc., but not deposited in the bank account of the corporation. The dates, amounts and payors are as follows:

January 20, 1954, $30.00, A. E. Lehman.

February 1, 1954, $5.00, Les Boyd.

March 20, 1954, $50.00, L. M. Boyd.

April 5, 1954, $23.75, Unknown.

April 15, 1954, $75.00, Portland Equipment Co.

Total, $183.75.

During the period December 1, 1953, through June 15, 1954, there were checks in the amount of $2,990.32 recorded as received by Highway Freight, Inc., but not deposited. The dates and amounts and payors of these checks are as follows:

December 18, 1953, $192.85, Park Loading Company.

February 23, 1954, $157.03, Park Lumber Co.

March 2, 1954, $297.19, Park Lumber Co.

March 23, 1954, $28.43, A. Fisher.

March 16, 1954, $398.74, Park Lumber Co.

March 11, 1954, $95.35, Granning and Treece.

April 11, 1954, $43.03, Jack Harbert.

April 12, 1954, $72.50, Parks Lumber Co.

April 7, 1954, $117.44, Granning and Treece.

May 18, 1954, $50.00, Tom Dunbar.

June 3, 1954, $110.00, Tom Dunbar.

June 7, 1954, $102.38, Tom Dunbar.

March 3, 1954, $70.04, H. R. Lee.
April 30, 1954, $387.28, Park Lumber Co.
May 21, 1954, $166.78, Lighthall and M. D. Knapp.
June 7, 1954, $422.27, D. Knapp.
June 7, 1954, $107.72, M & N Logging Co.
June, $171.39, Composition Unknown.
Total, $2,990.32.

These checks were marked in the books as being taken by defendant, although there is no record of such amounts in the drawing account of the defendant.

For his second cause of suit plaintiff contends as follows:

That defendant during the period May 29, 1951, until July 20, 1954, mismanaged the affairs of Highway Freight, Inc. That permitting unpaid taxes to accumulate as set forth in Paragraph VIII of Agreed Facts is mismanagement. That allowing a judgment in favor of Butlers Tire and Battery Co., Inc., to remain unpaid for a period which resulted in a Highway Freight, Inc. rig being executed on and kept off the road and out of productive use for at least a week is mismanagement. That turning current accounts receivable over to employees to pay their own salaries is mismanagement. That an instance of mismanagement was losing valuable and lucrative interchange rights with Okey's Trucking of Woodland, Washington, due to refusal to pay to Okey's Trucking its share of interchange business, refusal to keep proper books on interchange busi-

ness and accepting of payments in the name of Highway Freight that should have been in the name of Okey's Trucking.

For his third cause of suit plaintiff contends as follows:

That defendant during the period May 29, 1951, until July 20, 1954, diverted corporate opportunities of Highway Freight, Inc. away from the corporation and to himself. That some of the instances of said diversion of corporate opportunities are as follows:

That for almost two years up to July 20, 1954, defendant personally has done motor carrier hauling for Park Lumber Co. of Estacada, Oregon. That said hauling has often been done with Highway Freight, Inc. vehicles and other equipment. That defendant has informed plaintiff and plaintiff therefore believes that defendant has cancelled an account receivable of Highway Freight, Inc. in return for a certain Diamond Tractor; that, thereafter, for many months previous to July 20, 1954, defendant proceeded to use said Diamond T Tractor for hauling, using other Highway Freight equipment and personnel to service said Diamond T Tractor and taking as his personal money all of the revenues obtained through the use of said Diamond T Tractor.

Defendant's Contentions

For answer to plaintiff's contentions, defendant denies each and every matter and thing therein

contained and the whole thereof, except as expressly admitted, modified or qualified hereinafter or in the agreed set of facts.

I.

Answering to plaintiff's first cause set forth in plaintiff's contentions, defendant denies misappropriating any funds belonging to Highway Freight, Inc., and contends that those items set forth in said cause as being misappropriated by defendant consist of expenditures made by defendant in payment of corporate obligations including the sum of $937.79, applied by defendant on his delinquent salary account in the amount of $3,214.49, and these items are clearly shown as being charged against defendant in the Books and Records of the corporation.

II.

Answering to plaintiff's second cause set forth in plaintiff's contentions, defendant denies any mismanagement of Highway Freight, Inc., and contends that those items therein set forth as being mismanagement on the part of defendant were the result of adverse economic conditions and inequitable acts of the plaintiff.

III.

Answering to plaintiff's third cause set forth in plaintiff's contentions, defendant denies diverting any corporate opportunities, and contends that the Diamond Tractor referred to therein was used only when corporate equipment was not available, and

used as an aid to the corporation's business, and that defendant credited his salary account for a portion of the purchase price of said tractor, cancelling an account receivable owed by the seller thereof in equal amount, and such is clearly reflected in the Books and Records of the corporation.

For defendant's first separate and distinct affirmative defense, defendant contends, as a separate instance to each of plaintiff's three causes, that plaintiff's contentions are insufficient to state a claim upon which relief can be granted to plaintiff.

For defendant's second separate and distinct affirmative defense, defendant contends that plaintiff committed inequitable acts in respect to defendant and the corporation, proximately causing the matters complained of in plaintiff's three causes of suit, and plaintiff can not now be heard to complain of defendant.

For defendant's third separate and distinct affirmative defense by way of counterclaim, defendant contends that defendant should have judgment of plaintiff in the amount of $3,000.00 with interest at the rate of 5 per cent per annum from the 20th day of July, 1954 until paid, on the promissory note set forth in Paragraph VIII of the agreed set of facts, together with the sum of $450.00 reasonable attorney's fees for the collection thereof.

Plaintiff's Reply Contentions

I.

Denies each and every matter and thing therein

contained and the whole thereof except as is expressly admitted or qualified in plaintiff's contentions herein.

II.

That plaintiff signed the promissory note set forth in defendant's counterclaim due to the fraudulent misrepresentation of the defendant in that plaintiff would not have signed this note but for the defendant's concealing the facts that he had misappropriated the money of Highway Freight, Inc., mismanaged its affairs and diverted its corporate opportunities to himself, all as alleged in plaintiff's complaint.

III.

That at the time plaintiff signed said note, he did not have knowledge of defendant's misappropriation, mismanagement and diversion of corporate opportunities.

IV.

That plaintiff signed this note in reliance on the fraudulent concealment and misrepresentations of the defendant.

V.

That plaintiff had a right to rely on the misrepresentation and fraudulent concealment of the defendant since defendant was the president of the company and in general charge of all its business matters, and was in charge of all books and records of said corporation.

VI.

That as a direct and proximate result of the misrepresentation of the defendant, plaintiff has been

injured in the sum of $3,000.00 the value of said promissory note.

VII.

Denies that $450.00 or any other sum is a reasonable sum to be allowed defendant as attorney's fees for the collection of said note.

Issues of Fact

I.

During the period May 29, 1951 until July 20, 1954, did defendant misappropriate funds of said corporation?

II.

During the period May 29, 1951 until July 20, 1954, did defendant mismanage the affairs of said corporation?

III.

During the period May 29, 1951, until July 20, 1954, did defendant divert corporate opportunities away from said corporation to himself?

IV.

Did plaintiff discover the facts of said alleged misappropriation, mismanagement and diversion of corporate opportunities through investigation after July 20, 1954?

Issues of Law

I.

Did defendant in the full time conduct of the general business matters of said corporation owe a fiduciary duty to plaintiff?

II.

Should defendant be ordered to account for all sums, if any, due to plaintiff on account of defendant's alleged misappropriation of funds of said corporation?

III.

Should defendant be ordered to account for all sums, if any, due to plaintiff on account of defendant's alleged mismanagement of said corporation?

IV.

Should defendant be ordered to account for all sums, if any, due to plaintiff on account of defendant's alleged diversion of corporate opportunities of said corporation to himself.

V.

Should plaintiff have judgment for such amounts as may be found as due plaintiff from defendant?

VI.

Are the facts alleged in plaintiff's complaint sufficient to state a claim upon which relief can be granted to plaintiff?

VII.

During the time that defendant was manager of said corporation, did plaintiff act inequitably in respect to defendant and said corporation so that plaintiff cannot be heard to complain of defendant?

VIII.

Should defendant be given judgment on his counterclaim?

IX.

Should said promissory note be cancelled on the grounds of fraud?

X.

In the event defendant be given judgment on his counterclaim is $450.00 or any other sum a reasonable sum to be allowed defendant as attorney fees for the collection of said note?

Plaintiff's Exhibits

1. General Ledger of Highway Freight, Inc.
2. Book of Journals of Highway Freight, Inc.
3. Cash Receipts — Sales Journals, Highway Freight, Inc.
4. Daily cash book of Highway Freight, Inc.
5. Mileage analysis sheets of Highway Freight, Inc.
6. Note signed by Clarence V. Watson and introduced in deposition.
7. Checkbook and Bank Statements of Clarence V. Watson introduced in deposition.
8. Transfer of title receipt from Secretary of State for Diamond T introduced in deposition.
9. Checks from Parks Lumber Company to Clarence V. Watson introduced in deposition.
10. Checks from Granning & Treece Company to Highway Freight Co., Inc. introduced in deposition.
11. Checks from Clarence V. Watson to I. W. Sterns introduced in deposition.

12. Promissory Note executed by purchasers of Highway Freight Company, Inc.

13. Conditional Sales Contract covering Diamond T Truck.

14. Power of Attorney—Watson to Button.

Defendant's Exhibits

1. Agreement dated July 20, 1954, between sellers and purchasers of said corporation.

2. Supplementary Contract dated July 20, 1954.

3. Bill of Sale dated July 20, 1954.

4. Promissory Note dated July 20, 1954.

5. Collateral agreement dated July 20, 1954.

It Is Hereby Ordered that the foregoing pre-trial order shall be amended, if necessary, if either party desires to introduce further exhibits, and that the said pre-trial order supersedes the pleadings filed herein.

Dated this 24 day of June, 1955.

/s/ GUS J. SOLOMON,
Judge

Approved by:

/s/ DON S. WILLNER,
Of Attorneys for Plaintiff

/s/ HARRY A. HARRIS,
Of Attorneys for Defendant

[Endorsed]: Filed June 24, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for trial before the Honorable Claude McColloch, Judge of the above entitled Court on Wednesday, September 7, 1955, plaintiff appearing in person and by his attorneys, Crawford & Willner, Wm. J. Crawford and Don S. Willner, and defendant appearing in person and by his attorneys, Stanley J. Mitchell and Harry A. Harris; thereupon evidence was introduced, and after both parties had rested, arguments were made by counsel for the respective parties and the matter was thereupon submitted to the Court. After considering said oral arguments and all evidence of the case and the memoranda previously submitted by the parties and the Court being fully advised in the premises now enters the following

Findings of Fact

I.

Plaintiff is a citizen, resident and inhabitant of the State of Washington and defendant is a citizen, resident and inhabitant of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

That on May 29, 1951, plaintiff and defendant purchased all of the stock of Highway Freight, Inc.,

an Oregon corporation engaged in the business of a motor carrier for hire.

III.

That 49½ shares of stock of said corporation were issued to plaintiff and 49½ shares of stock of said corporation were issued to defendant and one share of stock of said corporation was issued to Earle V. White, Jr. who had no beneficial interest in said corporation.

IV.

That at a special meeting of the stockholders of said corporation on May 29, 1951, plaintiff and defendant and Earle V. White, Jr. were duly elected directors of said corporation.

V.

That at a meeting of the Board of Directors of said corporation on May 29, 1951, defendant was duly elected president-treasurer of said corporation with the duties of general manager and with the full-time care of the general business matters of the corporation and did so act at all times from May 29, 1951, until July 20, 1954.

VI.

That all of the stock of the corporation was sold on July 20, 1954, by plaintiff and defendant and Earle V. White, Jr. and as a part of the sale the purchasers agreed to release and discharge defendant from any claims and demands existing against him in favor of the corporation.

VII.

That defendant during the period May 29, 1951, to July 20, 1954, misappropriated $13,945.98 from said corporation. That said amount is composed of the following:

(a) $3,866.25—cash items and checks in records, but not deposited.

(b) $403.67—customer's checks not in books.

(c) $2,229.81—non-duplicated deposits in defendant's private bank account.

(d) $1,100.00—deposits in defendant's private bank account after June 15, 1954, for prior hauling.

(e) $690.00—California State Board of Equalization performance bond refund.

(f) $696.66—McCracken receivable.

(g) $550.00—Sleeper cab receivables.

(h) $327.54—mileage shrinkage of May 6, 1954.

(i) $2,450.96—Diamond T operation expense.

(j) $1,631.09—Kirkpatrick, Scott Lumber and M & M Plywood receivables.

VIII.

That the present owners of Highway Freight, Inc. are not entitled to receive the sums listed in Findings VII and VIII above and the present owners of Highway Freight, Inc. have not been damaged by the misappropriation and mismanagement of defendant.

IX.

That plaintiff through investigation discovered

the misappropriation and mismanagement listed in Finding VII above after July 20, 1954.

X.

That plaintiff and defendant are now jointly responsible for the liabilities of Highway Freight, Inc. incurred previous to July 20, 1954, which exceed $68,000.00.

XI.

That on or about July 20, 1954, plaintiff made, executed and delivered to defendant his promissory note in the amount of $3,000.00; that plaintiff signed said promissory note due to the fraudulent misrepresentations of defendant; that at the time plaintiff signed said note he did not have knowledge of defendant's misappropriation and mismanagement; that plaintiff signed said note in reliance on the fraudulent misrepresentations of the defendant upon which plaintiff had a right to rely.

Based upon the foregoing Findings of Fact, the Court hereby makes and enters the following

Conclusions of Law

I.

Defendant in the full-time conduct of the general business matters of Highway Freight, Inc. owed a fiduciary duty to plaintiff.

II.

The facts alleged in plaintiff's complaint are suf-

ficient to state a claim upon which relief can be granted to plaintiff.

III.

During the time that defendant was manager of Highway Freight, Inc. plaintiff did not act inequitably in respect to defendant and said corporation.

IV.

Plaintiff should be given judgment against the defendant in the amount of $13,945.98 for misappropriation.

V.

Plaintiff should have judgment against defendant on defendant's counterclaim.

VI.

The promissory note given to defendant by plaintiff on July 20, 1954, should be cancelled for fraud.

Dated this 23rd day of September, 1955.

/s/ CLAUDE McCOLLOCH,
District Judge

Certificate of Sevice attached.

[Endorsed]: Filed September 23, 1955.

In the District Court of the United States for the District of Oregon

No. Civil 7686

WOODROW C. BUTTON, Plaintiff,

vs.

CLARENCE V. WATSON, Defendant.

JUDGMENT

This matter having come on for trial before the Honorable Claude McColloch, Judge of the above entitled Court on Wednesday, September 7, 1955, plaintiff appearing in person and by his attorneys, Crawford & Willner, Wm. J. Crawford and Don S. Willner and defendant appearing in person and by his attorneys, Stanley J. Mitchell and Harry A. Harris; thereupon evidence was introduced and after both parties had rested arguments were made by counsel for the respective parties and the matter was thereupon submitted to the Court. After considering said oral arguments and all evidence of the case and the memoranda previously submitted by the parties and the Court having heretofore entered its findings of facts and conclusions of law, and the Court being fully advised in the premises,

Now, Therefore, based upon said findings of facts and conclusions of law:

It Is Hereby Ordered, Adjudged and Decreed:

1. Plaintiff is hereby given judgment against the

defendant in the sum of $13,945.98 on his first cause of suit.

2. Plaintiff is hereby given judgment against defendant upon defendant's counterclaim.

3. The promissory note from plaintiff to defendant signed on July 20, 1954, is hereby cancelled because of the fraud of the defendant.

4. Plaintiff is hereby given judgment against defendant in the amount of his costs and disbursements herein which are taxed at $438.66.

5. Execution shall issue for the above amounts.

Dated this 23rd day of September, 1955.

/s/ CLAUDE McCOLLOCH,
District Judge

[Endorsed]: Filed September 23, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Woodrow C. Button, the above named plaintiff, and Crawford and Willner, his attorneys:

You and Each of You, Will please take notice that the above named defendant, Clarence V. Watson, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment, and each and every part and the whole thereof, made and entered in the above entitled Court and cause on the 23rd day of September, 1955, providing as follows: (omitting recital)

"1. Plaintiff is hereby given judgment against the defendant in the sum of $13,945.98 on his first cause of suit.

2. Plaintiff is hereby given judgment against defendant upon defendant's counterclaim.

3. The promissory note from plaintiff to defendant signed on July 20, 1954, is hereby cancelled because of the fraud of the defendant.

4. Plaintiff is hereby given judgment against defendant in the amount of his costs and disbursements herein which are taxed at $438.66.

5. Execution shall issue for the above amounts."

/s/ Claude McCulloch

/s/ HARRY A. HARRIS,
Of Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed October 21, 1955.

[Title of District Court and Cause.]

UNDERTAKING FOR PAYMENT OF COSTS ON APPEAL

Whereas, Clarence V. Watson, defendant in the above entitled Court and cause, appeals to the United States Court of Appeals for the Ninth Circuit from that certain judgment heretofore, to-wit: on the 23rd day of September, 1955, rendered and entered in the above entitled Court and cause and in favor of the plaintiff, Woodrow C. Button, and

against the defendant, Clarence V. Watson, and Notice of said Appeal being filed simultaneously herewith.

Now, Therefore, In consideration of the premises and of such appeal we, Clarence V. Watson, as Principal, and General Casualty Company of America, a corporation, organized and existing under the laws of the State of Washington, and duly authorized to transact a surety business in the State of Oregon, as Surety, do hereby jointly and severally undertake and promise to pay to Woodrow C. Button, and are firmly bound unto him for the sum of Two Hundred Fifty Dollars ($250.00).

The condition of this Bond is such that upon appeal the defendant shall pay all costs adjudged against him if said appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this Bond shall be void, but if the defendant fails to perform this condition, then in that event, payment of the amount of this Bond shall be due forthwith.

In Witness Whereof, The said Principal has caused these presents to be signed and executed, and the said Surety has caused these presents to be duly executed by its authorized officers, and its corporate seal to be hereunto affixed this 21st day of October, 1955.

/s/ CLARENCE V. WATSON

[Seal] GENERAL CASUALTY COMPANY OF AMERICA,

/s/ By J. J. HAHN,
Attorney-in-Fact

Countersigned at this 21st day of October, 1955,

/s/ By DWIGHT CATHERWOOD,
Resident Agent

Acknowledgment of Service attached.

[Endorsed]: Filed October 21, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendant-Appellant intends to rely upon the following, and will contend that the United States District Court erred in the following respects:

1. In denying defendant's Motion to Dismiss;

2. In giving judgment for plaintiff upon defendant's counter-claim, and not giving defendant judgment thereon.

/s/ HARRY A. HARRIS,
Of Attorneys for Defendant-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed October 28, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District

Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Notice of motion to dismiss; Minute order reserving decision on motion; Answer; Reply; Minute order denying motion to dismiss; Order denying motion to dismiss; Pre-trial order; Findings of fact and conclusions of law; Judgment; Notice of appeal; Undertaking for payment of costs on appeal; Notice of cross-appeal; Undertaking for payment of costs on cross-appeal; Statement of points on appeal; Designation of contents of record on appeal; Additional designation of contents of record on appeal; Order to forward exhibits to Court of Appeals and Transcript of docket entries; constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7686, in which Clarence V. Watson is the defendant and appellant and Woodrow C. Button is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designations of the appellant and appellee, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, $5.00 and the cost of filing the notice of cross-appeal, $5.00 have been paid by the appellant and the appellee.

I further certify that the exhibits will be forwarded by express at a later date.

In Testimony Whereof I have hereunto set my

hand and affixed the seal of said court in Portland, in said District, this 14th day of November, 1955.

[Seal] R. DeMOTT, Clerk

/s/ By F. L. BUCK, Chief Deputy

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS
(Partial)

Portland, Oregon, September 6, 1955

Before: Honorable Claude McColloch, Chief Judge.

* * * * *

WOODROW C. BUTTON

the plaintiff in the above entitled cause, was produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

* * * * *

Cross Examination

Q. (By Mr. Harris): Now I believe you stated that at that time Mr. Watson also, in order to consummate the deal, sold a truck that he owned to Kaer and Hamrick, did he not, or did he sell that truck to you?

A. No, he sold the truck to me.

Q. And you gave him a note, did you, for it?

A. I did.

Q. What was the principal amount of the note, do you recall? A. $3,000.

* * * * *

Q. You stated in your contentions here that you were defrauded into buying this truck that Clarence Watson sold to you that you gave a note for. Now was the truck worth the money?

A. Are you referring to the Diamond T?

Q. Yes, the Diamond T that was sold as part of the deal.

A. I assume it was worth the money on the basis that Kaer and Hamrick, the purchasers, were willing to pay the same price for it to Clarence.

Q. In other words, there is no question of any misrepresentation as to the condition of the truck, or anything of that sort?

A. Not as far as I know.

* * * * *

[Endorsed]: Filed November 29, 1955.

[Endorsed]: No. 14973. United States Court of Appeals for the Ninth Circuit. Clarence V. Watson, Appellant, vs. Woodrow C. Button, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 13, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 14973

United States
COURT OF APPEALS
For the Ninth Circuit

CLARENCE V. WATSON,

Appellant,

vs.

WOODROW C. BUTTON,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

STANLEY J. MITCHELL
HARRY A. HARRIS
101 Hogg Building
Oregon City, Oregon
Attorneys for Appellant.

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No. 14973

United States
COURT OF APPEALS
For the Ninth Circuit

CLARENCE V. WATSON,

Appellant,

vs.

WOODROW C. BUTTON,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Oregon was based upon diversity of citizenship of the parties and the amount in controversy being in excess of $3,000.00, exclusive of costs and interest, (28 U.S.C.A. 1332 (1); R. 3)

This Court's jurisdiction is founded upon its ap-

pellate power over final decisions of the District Courts. (28 U.S.C.A. 1291; R. 51)

STATEMENT OF THE CASE

This case arises on appeal from a final judgment in an equity case wherein appellee brought a direct action to secure an accounting and recover a personal judgment against appellant for corporate monies misappropriated by appellant during his tenure as corporate manager of Highway Freight, Inc., an Oregon Corporation.

The complaint alleged three causes of action, the latter two of which dealt with alleged mismanagement and diversion of corporate opportunity. However, the Court below did not enter judgment on the latter, leaving only the misappropriation of appellant for consideration here. (R. 3 through 12, 51 and 52)

Appellant moved to dismiss the complaint in that it failed to state a claim for relief and for other reasons not urged here. (R. 13)

Thereafter, appellant filed an answer containing several defenses, the only one of any importance here being an incorporation in his answer that the complaint failed to state a claim for relief, and including in his answer a counter-claim for a note

executed by appellee in the amount of $3,000.00. (R. 20, 24, 25 & 26)

Thereafter, appellee filed his reply to the answer, asking that the note be cancelled for fraud on the part of appellant. (R. 27, 28)

The Court then entered an order denying appellant's motion to dismiss, upon which decision had been previously reserved, a pre-trial order was filed, and trial was had, resulting in the Court entering Findings of Fact and Conclusions of Law, and giving judgment in favor of the appellee for $13,945.98, and his costs, and cancelling the note executed by appellee to appellant for fraud, and giving judgment against the appellant on his counterclaim. (R. 29, 14, 30, 46, 51)

Since with the exception of the counter-claim on the note, we admit as true the Findings of Fact of the Court, and since these Findings are identical with the allegations contained in appellee's complaint and in the pre-trial order, we will here summarize these facts for the Court's convenience.

In May, 1951, appellant, an Oregon resident, and appellee, a resident of the State of Washington, purchased 49½ shares of stock each in Highway Freight, Inc., an Oregon Corporation, engaged in the business of a motor carrier for hire. One share

of stock was given to one Earl V. White, Jr., who had no beneficial interest in the corporation. On the same date, these three persons elected themselves directors, and in addition appellant was elected president-treasurer, and given the duties of general manager of the corporation, and acted as such until July, 1954, when all of the stock of the corporation was sold by the parties.

Simultaneously, with this sale, appellant secured as part of the sale, an agreement from the purchasers to release and discharge him from any claims and demands existing against him in favor of the corporation. After this sale, appellee discovered appellant had misappropriated $13,945.98 from the corporation. The present owners of the corporation are not entitled to receive these sums, and have not been damaged thereby, and at this time appellant and appellee are jointly responsible for $68,000.00 in liabilities of the corporation incurred prior to July 20, 1954, the date of the sale.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to dismiss the case in that neither the complaint, agreed statement in the pre-trial order or Findings support a claim for relief, and appellant's motion to dismiss

should have been allowed.

2. The District Court erred in failing to give appellant judgment on his counter-claim.

SUMMARY OF ARGUMENT

1. Misappropriation of corporate money by a corporate officer is a purely corporate cause of action, which must be redressed in the first instance by the Corporation itself, with any judgment recovered being an asset of the corporation. In the event the corporation neglects, refuses or is unable to act, then a derivative action may be maintained by present stockholders or under certain circumstances, the creditors or a trustee in bankruptcy. This type of suit, although initiated by others, is brought through the corporate entity and any monies so secured are assets of the corporation. Appellee, as an ex-stockholder at the time he brought his action, stood as a stranger to this corporate cause of action, which he has been allowed to adopt and secure judgment upon, even though he has affirmatively pleaded and the Court found as a fact that the corporation, which we contend as a matter of law, owned the corporate cause of action and whose property it was, had agreed to release appellant.

2. The fraud alleged by appellee in his defense to appellant's counter-claim shows upon the face of his pleadings to be merely sham, and is not supported by the evidence, and does not constitute fraud in the legal sense of the word.

ARGUMENT

I.

Appellee has stated no claim for relief.

That a corporation is a body politic having a separate existence as a distinct person in law in which the whole corporate property, including its choses in action, is vested, is so well established, that no authority need be cited in support.

That wrongs of the nature here complained of are wrongs against the corporate entity, giving the corporation a primary right to secure their redress, is likewise well established. (Vol 13, Am. Jur., Sec. 1015, page 966.)

That a stockholder may, under proper allegation, bring a derivative action for or on behalf of the corporation to correct abuses by officers of the corporation and to secure for the corporation assets lost because of the wrongful acts of the directors of

the nature here set forth is likewise well established. (Vol. 13, Am. Jur., Sec. 461, page 504, Rule 23 (b), F. R. C. P.)

It is also well established that in order to have the necessary standing to bring a stockholder's derivative suit, one must be a stockholder at the time of bringing the suit and during its continuance. (Ballantine on Corporations, Revised Edition (1946), Page 350)

Accordingly appellee now contends that since he has no standing in Court to secure these monies for the coffers of the corporation because he has sold his stock, and the purchasers have agreed to release the appellant, that he should be allowed to adopt these corporate causes of action and secure the money for his own purse. The principles involved are very ably discussed in the case of Likens v. Shaffer, 64 F. Supp. 432 (1946). (This case was modified 141 Fed. 2d 877, with regard to collateral matters.) In this case, Judge Graven very thoroughly and comprehensively discusses all of the operative principles involved upon which we relied on our motion to dismiss together with the authorities for these principles. Therefore, we will not quote extensively from the case. However, the following are a few of the principles therein enunciated:

The Court quoting from the case of Dillon v. Lee favorably cited therein: "A fraud . . . on the part of the directors or officers of a corporation is an injury done to the corporation itself. . ." "And no individual right of action rests in a stockholder where the directors have caused loss to the corporation through their carelessness and mismanagement. An individual right of action in stockholder against an officer of a corporation can arise only from some private relation, contractual or fiduciary, as distinguished from a purely corporate relation common to all of the stockholders."

"The fact that a stockholder owns all or practically all or a majority of the stock in a corporation does not permit him to sue as an individual for a wrong done to the corporation."

In this case, the Court also discusses the case of Smith v. Bramwell, 1934, 146 Ore. 611, 31 Pac. 2d 647. Wherein the Oregon Supreme Court states flatly: "It is a well established rule that a stockholder of a corporation has no personal right of action against directors or officers who have defrauded or mismanaged it and thus effected the value of its stock. The wrong is against the corporation and the cause of action belongs to it. Any judgment obtained by reason of such wrongs is an asset of the corporation which enures first to the benefit of the

creditors and secondly to the benefit of the stockholders."

Although we do not pretend to know all the reasons for this particular rule, we submit that some of the more cogent would be as follows:

1. A judgment obtained by the stockholder would not serve to be a bar to another suit brought by the creditors acting through the corporation on the theory that the money misappropriated from the corporation is part of the trust fund available to the creditors.

2. Appellant had no opportunity to present any counter-claims accruing to his benefit against the corporation, or to plead the corporate release in bar.

3. The stockholder could recover the judgment for the full amount of monies misappropriated, spend the money, and leave the other stockholders and creditors holding the sack.

It is interesting to note in this respect that appellee was given judgment for the entire amount of money misappropriated.

It would appear to be common sense that in any event he would not be entitled to more than 49½ per cent of these corporate monies even were he able to maintain the action. The Court has given

judgment to appellee not only for his own 49½ per cent of the corporate monies taken, but also appellant's share of 49½ per cent, which by virtue of his former stockholdings in the corporation, he would be equally entitled if appellee's theory of the case were followed.

To put it in another way, part of appellee's judgment represents money which appellant misappropriated from himself. The only rationale which we feel could be proferred in support of this, would be to contend that appellant is such a villain that he does not deserve any consideration.

II.

The Court erred in failing to give appellant judgment on his counter-claim for the $3,000.00 note executed by appellee.

At the outset, it will be noted that appellee in the agreed statement of facts in the pre-trial order admits all material allegations of appellant's counter-claim regarding the note. (R. 32) Thus leaving only the issue of fraud either in the inducement or execution of the note to bar appellant's recovery.

Appellee further admits in his testimony that the truck sold to him by appellant, which constituted

consideration for the note, was worth the money, and that there were no false representations involved in the sale regarding the truck itself. (R. 57, 58)

Actually what appellee is saying when he claims fraud is this: "Because appellant did not tell me of his misappropriation of the corporate funds, I bought a truck from him, and even though this truck was worth the money, because I sold it to a third party who is paying me what I agreed to pay appellant on my note I should not have to pay for the truck because appellant didn't tell me that he misappropriated these corporate monies."

We submit that this is highly improper, and under no circumstances, should appellee have been allowed cancellation of the note.

He admits that the consideration of the note, i.e. the truck, was worth the money, and admits that he has been receiving payments for the resale. He admits that the note is in default, and even if the misappropriation were a legal cause of cancellation of the note, there would still be the fact remaining that appellee was not damaged.

We submit, further, that the misappropriation had nothing whatsoever to do with the transaction concerning the truck, and as a result of the Court's cancelling the note, the appellee is placed in the

enviable position of not only receiving full judgment for the matters complained of constituting the fraud as a defense, but also getting appellant's truck or at least the fruits thereof in the bargain.

CONCLUSION

The decision of the United States District Court for the District of Oregon should be reversed, and this case should be remanded for further proceeding in accordance with the opinion of this Court.

Respectfully submitted,

STANLEY J. MITCHELL,
HARRY A. HARRIS,
Attorneys for Appellant.

No. 14973

United States
COURT OF APPEALS
for the Ninth Circuit

CLARENCE V. WATSON,
Appellant,

vs.

WOODROW C. BUTTON,
Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

STANLEY J. MITCHELL,
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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4.56

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APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Oregon was based upon the fact that plaintiff is a citizen, resident, and inhabitant of the State of Washington and defendant is a citizen, resident, and inhabitant of the State of Oregon, and that the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. 28 U.S.C. 1332(1); Complaint (R. 3); and Pre-Trial Order (R. 30).

The jurisdiction of this Court is based upon appellant filing and serving a Notice of Appeal and Undertaking for Payment of Costs on Appeal within 30 days from the date of the final decision of the United States District Court for the District of Oregon. 28 U.S.C. 1291, Rule 73, Federal Rules of Civil Procedure, Judgment (R. 51), Notice of Appeal (R. 52), Undertaking for Payment of Costs on Appeal (R. 53).

STATEMENT OF THE CASE

Appellant is here seeking to reverse an equitable judgment against him for misappropriation and fraud. He admits the misappropriation and does not contest the fraud. He admits that he misused his position as president of Highway Freight Inc. to steal $13,945.98. He does not contest the finding that he practiced fraud. Instead, he urges that no one can sue him for misappropriation and that the fraud is not a defense.

Appellant has not seen fit to bring the Transcript of Evidence before this Court.

The Findings of Fact entered by the District Court tell us that appellant Clarence Watson and appellee Woodrow Button were the sole beneficial owners of Highway Freight, Inc., a two-man trucking company (R. 43). Watson was president and general manager (R. 47). On July 20, 1954, Watson and Button sold all the stock of the company (R. 43). Thereafter, Button discovered that during the three years that they owned Highway Freight, Inc. Watson had misappropriated

$13,945.98 (R. 48). This amount was described by the District Court in its Findings of Fact as follows:

"(a) $3,866.25—cash items and checks in records, but not deposited.

(b) $ 403.67—customer's checks not in books.

(c) $2,229.81—non-duplicated deposits in defendant's private bank account.

(d) $1,100.00—deposits in defendant's private bank account after June 15, 1954 for prior hauling.

(e) $ 690.00—California State Board of Equalization performance bond return.

(f) $ 696.66—McCracken receivable.

(g) $ 550.00—Sleeper cab receivables.

(h) $ 327.54—mileage shrinkage of May 6, 1954.

(i) $2,450.96—Diamond T operation expense.

(j) $1,631.09—Kirkpatrick, Scott Lumber and M & M Plywood receivables." (R. 48).

The Court below also found as fact that,

(1) "The purchasers agreed to release and discharge defendant from any claims and demands existing against him in favor of the corporation." (R. 47).

(2) "That the present owners of Highway Freight, Inc., are not entitled to receive the sums listed in Findings VII and VIII above and the present owners of Highway Freight, Inc. have not been damaged by the misappropriation and mismanagement of defendant." (R. 48).

This suit was brought by Button asking for an accounting and judgment for misappropriation, mismanagement, and diversion of corporate opportunity. The court below only enter judgment for misappropriation.

Watson counterclaimed below for judgment on a promissory note given him by Button at the time that

they sold Highway Freight, Inc, and before Button discovered the misappropriations (R. 24, 31, 48). The Court cancelled this note for fraud, finding,

> "That plaintiff signed said promissory note due to the fraudulent misrepresentations of defendant; that at the time plaintiff signed said note he did not have knowledge of defendant's misappropriation and mismanagement; that plaintiff signed said note in reliance on the fraudulent misrepresentations of defendant upon which plaintiff had a right to rely." (R. 49).

Appellant Watson contends that no claim for relief has been stated and that he should have judgment on the promissory note because the fraud found by the Court below is not a defense. Appellee seeks the affirmance of the judgment.

ANSWER TO APPELLANT'S FIRST SPECIFICATION OF ERROR

I. The law gives appellee a remedy for the misappropriations of appellant.

Woodrow Button filed suit below seeking the aid of Equity to recover the money that had been misappropriated and looted by Clarence Watson. The Oregon constitution provides that,

> "Every man shall have a remedy by due course of law for injury done him in his person, property or reputation." (Article I, Section 10, Oregon Constitution).

The Oregon Legislature has enacted Section 1.160 ORS which states that,

> "When jurisdiction is, by the organic law of this state, or by this Code or any other statute, conferred on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceedings be not specifically pointed out by this Code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

This section was clearly construed by the Oregon Supreme Court in the case of *Aiken v. Aiken,* 12 Or. 203, 6 Pac. 682 (1885), where it was stated,

> "It is beyond the scope of legislative wisdom to prescribe a specific remedy for every class of cases that may arise in the complication of human affairs, and it was not attempted; but ample provision was made to prevent a party from being left remediless in case of an infringement upon his legal rights, and the court must of necessity recognize the provision and carry it out when a proper case is presented."

The wrong of misappropriation is admitted by Watson. Button should have a remedy.

II. Appellee's remedy cannot be a shareholder's suit.

It seems clear that since appellee was no longer a shareholder of the corporation when this suit was filed that his remedy could not be a derivative suit. Thus Ballantine On Corporations, Revised Edition (1946), states on page 350,

> "To have standing to bring a derivative suit the plaintiff must be the owner of shares, either of record or as equitable owner, at the time of bringing the suit and during its continuance."

III. Appellee's remedy must be an individual suit.

Watson as president-manager of Highway Freight owed Button a fiduciary duty. As the only other former shareholder of Highway Freight, Inc., Button is the only one damaged by the stealing of Watson. The Court below has found as a fact that the present owners of the Company have not been damaged by the misappropriation and are not entitled to the stolen money (R. 48). Here, the wrong to Button was separate and distinct from the wrong to any other person.

Unless Button in a case like this can recover, the president-manager of a two-man corporation could loot and embezzle at will, secure in the knowledge that the remedies of the other shareholder are ended if the corporation is sold without the looting being discovered. No court of Equity could countenance such a result.

Under Oregon law, an individual suit is allowing against directors who breach their fiduciary duty. The case of *Davis v. Hofer,* 38 Or. 150, 63 Pac. 56 (1901), was a suit for an accounting by a shareholder as an individual against defendants who constituted a majority of the Board of Directors, for corporation money allegedly fradulently misappropriated to the use of defendants. The Court in allowing the accounting stated,

> "The rule is of universal application that a court of equity has jurisdiction to settle an account wherever a fiduciary duty exists between the parties upon whom the duty of keeping account rests . . . [citations] . . . To cite authorities illustrative of the principle that the directors of a corporation are the

> agents of and trustees for the stockholders, who have a quasi reversionary interest in the corporate property after the payment of the corporate debts, seems unnecessary, and the fiduciary relation existing between the parties having been clearly stated in the complaint, jurisdiction of the subject matter attached in equity." (38 Or. 153).

In that case the individual suit was brought by one still a shareholder and the Court had no difficulty finding a cause of suit.

In the case of *Smith v. Bramwell,* 146 Or. 611, 31 P. 2d 647 (1934), cited in appellant's brief on page 8, it is clearly recognized that even in a suit by a present shareholder, relief can be obtained where the damages are "separate and distinct from those resulting to the other shareholders" (146 Or. 620), as they are in our case.

In a suit by a former shareholder, it seems even clearer that an individual suit should be allowed. Thus in the more recent case of *Enyart v. Merrick,* 148 Or. 321, 34 P. 2d 629 (1934), the Oregon Court allowed a former shareholder of a dissolved corporation to bring an individual suit against a former director for an accounting for breach of a fiduciary duty to plaintiff. The director in that case misappropriated pledged stock belonging to the plaintiff. The Court stated,

> "Almost universally, courts of equity treat the relationship of director and stockholder as a trusteeship. Its name or terminology is not material. The law is well-settled that a director is not to be permitted to deal with the corporate stock of other shareholders nor with the assets of the corporation so as to make a profit for himself as distinguished

from his share of dividends in which his fellow shareholders participate." (148 Or. 331).

The *Davis v. Hofer* and *Enyart v. Merrick* cases spell out the fidicuiary duty that Clarence Watson, the president-manager, owed to Woodrow Button, the other shareholder. One of these cases allows an individual suit by a present shareholder, one by a former shareholder. Both recognize that in cases of misappropriation there must be a remedy to the aggrieved party.

The necessity for granting equitable relief in a situation like that presented in the case at bar is best explained in the much cited case of *Hammer v. Werner,* 239 App. Div. 38, 265 N.Y. Supp. 172 (1933). The plaintiff in that case was a former shareholder, as is the plaintiff-appellee here. There as here the plaintiff sought recovery for a breach of fiduciary duty to him. In the New York case, the breach of fiduciary duty consisted of the former directors personally acquiring a block of treasury stock without affording plaintiff an opportunity to participate ratably in the purchase. In that case as in our case, there could be no suit in the name of the corporation against the guilty party or parties. There, because the purchasers of the corporation took with notice of defendant's actions. Hrere, because the purchasers have agreed to release defendant from any claims existing against him in favor of the corporation. In that case as in our case plaintiff acquired knowledge of defendant's breach of fiduciary duty after sale of the stock. The New York Court in upholding the position of the plaintiff stated,

> "The fact that a particular act of directors may constitute a wrong to the corporation which may be righted ordinarily on behalf of the corporation does not bar a stockholder from having redress if that act effects a separate and distinct wrong to him independently of the wrong to the corporation. Redress of this latter wrong is available to him personally despite the right of a present stockholder to redress the wrong in a derivative action so far as it relates to the corporation." (265 N.Y. Supp. 179).

The Court then discusses an earlier New York case which,

> ". . . leaves untouched rights which are personal to the stockholder as a consequence of injuries to his property rights, suffered by him personally at the time he was a stockholder and of which injuries he learns after he has ceased to be a stockholder. Such a chose in action vests in a stockholder apart and distinct from any rights of a derivative character which passes when he conveys the stock. The only chose in action which inheres in the stock and passes when it is conveyed is one that is enforceable exclusively in a derivative action. Plaintiff therefore may maintain this action to redress a wrong to him personally, of the character hereinbefore indicated, while he was a stockholder, although he is not now a stockholder. It is particularly important that such a right may be vindicated, if the wrong was done where no present stockholder exists who can right it, because of the allegation that the present sole stockholder took with knowledge of the wrongful acts of the directors, which wrongful acts for the most part, if not entirely, do not do any damage to the corporation but may be found to have damaged those who were stockholders when the acts of which complaint is made occurred." (265 N.Y. Supp. 179-180).

In our case, the damage was to the plaintiff-appellee who was the only other stockholder with a beneficial interest "when the acts of which the complaint is made occurred."

An Alabama case, *Rochell v. Oates,* 241 Ala. 372, 2 So. 2d 749 (1941), like our case, deals with a suit for an accounting by a former shareholder. There, plaintiff was suing the former directors of a dissolved corporation to compel them to distribute money retained in their hands. In discussing the duty of the directors, the Court stated,

> "As such trustees of a dissolved corporation, they are severally and jointly liable to creditors and stockholders, and may be sued jointly or severally for an accounting as such trustees to all the stockholders, and such a suit may be brought by a single stockholder or shareholder, without bringing into court all other stockholders." (2 So. 2d 751).

Our case is even stronger, because appellant and appellee were the only shareholders with a beneficial interest (R. 47).

The Alabama case was brought by a stockholder against the directors. A similar case in Michigan, *Backus v. Kirsch,* 264 Mich. 73, 249 N.W. 469 (1933), allows a suit against the president of a dissolved corporation by former shareholders for breach of fiduciary duty. In that case as in our case, the defendant president had misappropriated corporation moneys. Plaintiffs there had sold their stock to defendant being unaware that the value of the stock had been lowered due to his misapropriations and they sued to rescind the sale. The Court stated,

> "This is not a stockholders' bill, as plaintiffs are not stockholders, having parted with their shares, and the corporation has been dissolved . . . [citations] . . . The fact that there can be no relief at the instance of stockholders and in behalf of the corporation . . . [citations] . . . does not mean that the wrongs done plaintiff are without remedy." (249 N.W. 470).

The Michigan Court thus stresses the principle that plaintiff should have a remedy when there can be no relief by a corporation suit—there must be a remedy for the wrong.

Likens v. Shaffer, 64 F. Supp. 432 (N.D. Iowa, 1946), cited by appellant on pages 7 and 8 of his brief, involves a suit by *present* shareholders of a corporation whose assets were wrongfully sold by the directors. Our suit was brought by the *former* shareholder who had no standing to right the wrong by bringing a shareholder's suit. The Court of Appeals in *Likens v. Shaffer,* 141 F. 2d 877 (8th Cir., 1944), reversed the District Court and held that plaintiff shareholders may have avoided the Statute of Limitations by making out a breach of fiduciary duty resulting in a constructive trust. The opinion cannot be read without gaining the impression that the Court is clearly saying that Equity will find a way to grant relief in a fact situation like the one there presented. (This controversy is also reported at 40 F. Supp. 729, 50 F. Supp. 103, 64 F. Supp. 432, and 323 U.S. 756.)

But even if the corporation could sue—it could not in our case—plaintiffs have been given a remedy for individual wrongs to them. In the New York case of

Blakeslee v. Sottile, 118 Misc. Rep. 513, 194 N.Y. Supp. 752 (1922), the plaintiff shareholder sued the active manager of the corporation who was the trustee of plaintiff's shares for diverting a corporate opportunity, the expiring Cadillac dealership, to another corporation which he had formed. The Court stated:

> "I see no difficulty in the application of the rule that, where the wrongful acts are not only wrongs against the corporation, but are also violations by the wrongdoer of a duty arising from contract or other obligation, and owing directly by him to the shareholders, that an individual action may be maintained, regardless of the fact of a corporate right to maintain an action for relief in its behalf." (192 N.Y. Supp. 752).

When the damage is to the individual plaintiff, as it is in our case, the Equity Court will provide a remedy. In the Pennsylvania case of *Porter v. Healy,* 244 Pa. 427, 91 Atl. 428 (1914), the plaintiffs were former shareholders suing former directors for an accounting of an illicit gain occurring when the defendants received more money proportionately for selling their interest in the corporation than the other shareholders did. The Atlantic Reporter head note sums up the case this way,

> "That a stockholder has parted with his stock does not deprive him of his right to sue in equity for an accounting, directors who unlawfully take advantage of their position to his detriment."

IV. By giving appellee a remedy for the wrong no one is hurt except the wrongdoer.

Appellant in discussing the misappropriations in his brief states, "we admit as true the Findings of Fact of

the Court." (Appellant's Brief, p. 3). He fully admits that he stole $13,945.98 but then argues that Button is not the right person to sue him for its return. If the doctrine of unclean hands is to mean anything it should apply in this case. Watson has no claim for relief at the hands of a Court of Equity. His only concern is that he not be sued twice for his theft.

There can be no suit against Watson by Highway Freight, Inc. The parties have stipulated in their Pre-Trial Order that the purchasers of Highway Freight, Inc. have agreed to release and discharge Watson from any claims and demands existing against him in favor of the corporation (R. 31). This has also been found as a fact in the findings of the District Court(R. 47).

The primary right of suit against a wrongdoer is in the party wronged. Creditors have no direct right of suit against a former president of a corporation. Ballantine on Corporations, Revised Edition (1946), p. 186. Creditors, under certain circumstances, are able to bring a derivative suit in the name of the corporation. But since the corporation has waived its rights to sue Watson the creditors have no cause of suit against him either, because their rights can be no higher than the rights of the corporation. There can be no duplicity of action against Watson.

Appellant on pages 9 and 10 raises the question of the correctness of the Findings of Fact of the court below dealing with the amount of the judgment that was entered for appellee. If appellant wishes to question whether $13,945.98 is the proper figure rather than

some percentage thereof he could have included this as a specification of error and brought here the Transcript of Evidence.

> "The evidence on which the findings are based is not in the record. Therefore, we must and do accept the findings as correct." *Bernard v. Johnson,* 103 F. 2d 567, 571 (9th Cir., 1931).

Union Pacific RR v. Bridal Veil Lumber, 219 F. 2d 825 (9th Cir., 1955); *Tozzi v. Balley,* 148 F. 2d 660 (9th Cir., 1945); *Rickard v. Thompson,* 72 F. 2d 807 (9th Cir., 1934); and *Bank of Eureka v. Partington,* 91 F. 2d 587 (9th Cir., 1937), have the same holding.

If appellee's judgment for misappropriation be sustained, no one is hurt except the confessed misappropriator, appellant herein.

ANSWER TO APPELLANT'S SECOND ASSIGNMENT OF ERROR

The District Court has made the following Finding of Fact:

> "That on or about July 20, 1954, plaintiff made, executed and delivered to defendant his promissory note in the amount of $3,000.00; that plaintiff signed said promissory note due to the fraudulent misrepresentations of defendant; that at the time plaintiff signed said note he did not have knowledge of defendant's misappropriation and mismanagement; that plaintiff signed said note in reliance on the fraudulent misrepresentations of the defendant upon which plaintiff had a right to rely." (R. 49).

Appellant argues in his brief, pages 10-12, that the evidence does not support this Finding of Fact and that

fraud is not a defense to the note. Instead of bringing up the Transcript of Evidence, appellant inserts in the Transcript of Record six questions and answers which were part of his cross-examination. This is like an appellant from a murder conviction including in the record only his answer to the question put to him by defense counsel whether he shot the victim.

The Court below heard all the evidence and arrived at the above Finding of Fact. Since the evidence is not before us we are not able to argue whether the Diamond T truck should have been originally included in the assets of Highway Freight, Inc. that were sold to the purchasers and whether there is evidence that appellee was damaged in the amount of $3,000.00 by being fraudulently induced to sign this promissory note in effect repurchasing the truck for the purchasers. All that we can say is that where appellant does not bring up all the evidence this Court has repeatedly held that the Finding of Fact will be accepted as correct. *Bernard v. Johnson,* supra; *Union Pacific RR v. Bridal Veil Lumber,* supra; *Tozzi v. Bailey,* supra; *Rickard v. Thompson* supra; *Bank of Eureka v. Partington,* supra (all decisions of this Court). Since every element of fraud was made out, the Court below made the only possible Conclusion of Law in cancelling the note for fraud.

CONCLUSION

For the reasons above stated the judgment of the United States District Court for the District of Oregon should be affirmed.

Respectfully submitted,

DON S. WILLNER,
WM. J. CRAWFORD,
Attorneys for Appellee.

No. 14975

United States
Court of Appeals
for the Ninth Circuit

NATIONAL VAN LINES, INC., a corporation,
Appellant,

vs.

ALFRED E. DEAN, trading under the firm name and style of National Transfer & Storage Co.,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —2-15-56

No. 14975

United States
Court of Appeals
for the Ninth Circuit

NATIONAL VAN LINES, INC., a corporation,
Appellant,

vs.

ALFRED E. DEAN, trading under the firm name and style of National Transfer & Storage Co.,
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Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court for the Southern District of California, Central Division

Civil Action No. 14783-T

NATIONAL VAN LINES, INC., Plaintiff,

vs.

ALFRED E. DEAN, trading under the firm name and style of National Transfer & Storage Co., Defendant.

COMPLAINT

To the Honorable Judges of the United States District Court for the Southern District of California, Central Division:

1. Plaintiff, National Van Lines, Inc., is a corporation organized and existing under the laws of the State of Illinois, having its principal place of business at 2431 Irving Park Road, Chicago 18, Illinois.

2. Defendant, Alfred E. Dean, is an individual doing business under the name and style of National Transfer & Storage Co., having its principal office and place of business at 4161 Pacific Highway, San Diego, California and within the jurisdiction of this court.

3. This action is brought for breach of contract and for service mark infringement under the Trade Mark Laws of the United States and also for unfair competition in trade. The parties hereto are citizens of different states, and the amount involved,

exclusive of interest and costs exceeds the sum of Three Thousand Dollars ($3,000.00.) [2]

4. Plaintiff is now and has for many years past continuously engaged in the business of the transportation of goods and particularly household goods by motor van in interstate commerce and including the State of California and within the jurisdiction of this court.

5. On or about October, 1928, plaintiff's predecessor, National Shippers and Movers, Inc., then a corporation of Illinois having a place of business at Chicago, Illinois adopted and used the word National as a service mark for the transportation of household goods by motor van.

6. On June 21, 1934 plaintiff company was incorporated in the State of Illinois and at that time acquired all of the assets of National Shippers and Movers, Inc. including the service mark National and all the good will of the business connected therewith and since that date has continuously used the service mark National for the transportation of goods by motor van.

7. That on or about June 21, 1934 plaintiff devised and adopted a design dominated by a plurality of wide, vertically disposed, laterally spaced apart red stripes to be used with the service mark National, and has since that date continuously used this design as a service mark for the transportation of goods by motor van.

8. On September 11, 1951 plaintiff National Van Lines, Inc. registered on the Principal Register of

the United States Patent Office under the Trade Mark Act of 1946 the service mark National and design constituting a shield background under Service Mark Registration No. 548,018 which covers the service of the transportation of goods by motor van. The shield background is red, white, and blue and is dominated by a plurality of wide, vertically disposed, laterally spaced apart red stripes. On September 9, [3] 1952, plaintiff National Van Lines, Inc. registered on the Principal Register of the United States Patent Office under the Trade Mark Act of 1946 the service mark National under Service Mark Registration No. 563,950 which covers the service of the transportation of goods by motor van.

Copies of these service mark registrations National and design and National are annexed hereto as Plaintiff's Exhibits Nos. 1 and 2. Certified copies of these registrations will be produced at the trial. Plaintiff is still the owner of said service marks and the registrations therefor, which are valid and subsisting, unrevoked, and uncancelled. Said service marks are of great value to plaintiff.

9. On or about November 7, 1944, plaintiff and defendant entered into an agreement whereby plaintiff authorized defendant to act as its sales agent. Pursuant to said agreement, defendant was licensed to use plaintiff's service mark National and design under certain conditions and limitations. Said agreement specifically provided that upon termination thereof, all rights and privileges enjoyed by defendant as a result of such agreement would forthwith terminate and specifically, defendant

would be prohibited from further using plaintiff's service marks.

10. Pursuant to said agreement entered into on November 7, 1944 between the parties, defendant operated thereunder and in accordance with the terms of said agreement until February 20, 1950, at which time the agreement was completely terminated. A copy of said agreement is attached hereto as Plaintiff's Exhibit No. 3 and made a part hereof.

11. Notwithstanding the termination of said agreement entered into on November 7, 1944 between the parties, defendant since the termination of this agreement on February 20, 1950 did continue and is presently continuing to employ plaintiff's service marks, contrary to the provisions of said agreement. Plaintiff has repeatedly advised defendant of the violation of plaintiff's rights and the wrongful use of its service marks. Notwithstanding such notice, defendant persists in the wrongful use of said marks.

12. Notwithstanding plaintiff's well-known and established rights in its service marks, defendant has in the San Diego, California territory and elsewhere continued to engage in the business of shipping household goods by motor van under the trade name of National Transfer & Storage Co. and has continued to use the service mark National and close imitations of plaintiff's service mark comprising a shield with dominant vertically disposed, laterally spaced apart red stripes and has offered for sale and has sold such services comprising the movement of household goods by motor van under

said service marks in competition with plaintiff and has deceived and continues to deceive the public into believing that its services are in fact plaintiff's services, and defendant threatens to continue such unfair competition and infringement all to plaintiff's irreparable injury and loss unless restrained by this court. [5]

13. Defendant with full knowledge of plaintiff's rights in the service marks National with design and National have unlawfully and wilfully infringed said service marks and registrations therefor, and have unfairly competed with plaintiff by offering for sale and selling services for the transportation of goods by motor van under the service marks National with design and National; and the acts of defendant are calculated to deceive and do in fact deceive the purchasing public into the belief that defendant's services are plaintiff's services; and said defendant threatens to continue to infringe said service marks and to compete unfairly, to plaintiff's irreparable injury and loss unless restrained by this court.

Wherefore, Plaintiff demands:

1. That defendant, his agents, servants, employees, privies, successors and assigns, and all holding by, through, or under him, be temporarily and permanently enjoined and restrained:

(a) From further violation of the agreement entered into on November 7, 1944, between plaintiff and defendant;

(b) From conducting business under the trade

name National Transfer & Storage Co. and from using in the sale or rendering of services relating to the moving of household goods by motor van the name National Transfer & Storage Co. or from using such name for any related services, or from using any name including the name National or any colorable imitation of plaintiff's registered Service Marks National and design and National;

(c) From otherwise infringing plaintiff's said service marks and registrations therefor;

(d) From unfairly competing with plaintiff in the sale or rendering of services relating to the transportation of household goods by motor van.

2. An accounting against defendant from all profits realized from the sale of services for the transportation of household goods by motor van and the like under the name National or National and design, or any colorable imitation of plaintiff's service marks National or National and design, and for all damages sustained by plaintiff on account of the infringement and unfair competition aforesaid, and that said damages be trebled.

3. That defendant be required to deliver up and to destroy all devices, letterheads, advertising material, etc. bearing the service marks National and National and design, and to strike out and obliterate the design display of said service marks on any and all trucks owned, operated, or in any way controlled by him.

4. That plaintiff have and recover its costs of this suit including reasonable attorneys fees.

5. That plaintiff have such other and further relief as this Court may deem just.

NATIONAL VAN LINES, INC.
/s/ By FRANK L. McKEE,
President [7]
/s/ ALBERT J. FIHE,
Attorney for Plaintiff

Duly Verified. [8]

PLAINTIFF'S EXHIBIT No. 1

Registered Sept. 11, 1951 Registration No. 548,018
Principal Register Service Mark
United States Patent Office

National Van Lines, Inc., Chicago, Ill. Act of 1946.
Application May 17, 1948, Serial No. 557,202.

[Service mark of National Van Lines, Inc.]

Statement

National Van Lines, Inc., a corporation duly organized under the laws of the State of Illinois, located at Chicago and doing business at 2431 Irving Park Road, has adopted and is using the service mark shown in the accompanying drawing, for Transportation of Goods by Motor Van, in Class 105, Transportation and storage, and presents herewith five specimens showing the service mark as actually used in connection with the sale or advertising of such services; the service mark being used as follows: on the sides of the trucks used in moving

goods; on advertising literature; on business cards; and on letter heads and envelopes, and requests that the same be registered in the United States Patent Office on the Principal Register in accordance with the act of July 5, 1946. No claim is made to the words "Nation Wide" and "Van Lines Inc." apart from the mark as shown.

The service mark was first used on July 21, 1934, and first used in the sale or advertising of services and the services rendered in commerce among the several States which may lawfully be regulated by Congress on July 21, 1934.

National Van Lines, Inc.,
By Frank L. McKee, President [9]

PLAINTIFF'S EXHIBIT No. 2

Registered Sept. 9, 1952 Registration No. 563,950
Principal Register Service Mark
United States Patent Office

National Van Lines, Inc., Chicago, Ill. Act of 1946.
Application January 4, 1952, Serial No. 623,200

[Service mark of National Van Lines, Inc.]

Statement

National Van Lines, Inc., a corporation duly organized under the laws of the State of Illinois, located at Chicago and doing business at 2431 Irving Park Road, has adopted and is using the service mark shown in the accompanying drawing, for the

Transportation of Goods by Motor Van, in Class 105, Transportation and storage, and presents herewith five specimens showing the service mark as actually used in connection with the sale or advertising of such services; the service mark being used as follows: on the sides of the trucks used in moving goods; on advertising literature; on business cards; and on letter heads and envelopes, and requests that the same be registered in the United States Patent Office on the Principal Register in accordance with section 2(f) of the act of July 5, 1946.

Applicant disclaims exclusive use of the words "Van Lines, Inc." apart from the mark as shown.

National Van Lines, Inc., is the owner of Registered Service Mark 548,018, registered September 11, 1951, on the Principal Register of the United States Patent Office.

The service mark was first used by applicant's predecessor in title on or about October 1928, and first used by applicant on June 21, 1934, and first used in the sale or advertising of services and the services rendered in commerce among the several States which may lawfully be regulated by Congress by applicant's predecessor in title on or about October 1928, and by applicant on June 21, 1934.

The mark is claimed to have become distinctive of the applicant's services in commerce which may lawfully be regulated by Congress through substantially exclusive and continuous use thereof as a mark by the applicant in commerce among the several States which may lawfully be regulated by

Congress for the five years next preceding the date of the filing of this application.

National Van Lines, Inc.,
By Frank L. McKee, President [10]

PLAINTIFF'S EXHIBIT No. 3
[Handwritten: "Canceled 2-20-50"]
Sales Agent Agreement

This agreement made and entered into by and between National Van Lines, Inc., an Illinois Corporation, hereinafter referred to as the "Company", party of the first part, and National Van & Storage Co., an Individual, located at 1431 Pacific Hiway, San Diego, California.

Witnesseth:

Whereas, the Company is a motor carrier engaged in the transportation of goods, wares and merchandise for hire on the public highways throughout the United States and Canada under the trade name of "National Van Lines", and maintains offices in various cities and towns in connection with its business; and

Whereas, the Sales Agent is now engaged in business and maintains an office in connection with such business; and

Whereas, The Sales Agent desires to associate himself with the Company as a sales representative in arranging for the transportation of goods, wares and merchandise in the name of National Van Lines, Inc., pursuant to their governmental certifi-

Plaintiff's Exhibit No. 3—(Continued)

cates, permits and franchises, and the operations that are authorized thereunder, on a commission basis.

Now therefore, in consideration of the mutual promises and covenants hereinafter set forth, the parties hereto agree as follows: * * * * * [11]

Sales Rights

The Company hereby grants to the Sales Agent the right and privilege of soliciting the transportation of goods, wares and merchandise and/or executing Orders for Services therefore, in the name of the Company, in accordance with current Company tariffs, in the territory hereby designated: for service in all States of the Union and Washington, D.C., excepting: Idaho, Montana, Nevada, North Dakota, Oregon, Utah, Vermont, Washington, Wyoming. The Sales Agent agrees to diligently exercise the sales rights granted herein, for the Company, to the exclusion of its competitors, except that the Sales Agent may solicit for the transportation of goods, wares and merchandise insofar as he is legally authorized and engaged. All orders are subject to acceptance by company.

Use of Company Name

The Sales Agent agrees that he will not use the names "National Van", "National Van Lines", "National Van Lines, Inc.", or any combination thereof, or the Company insignia, and/or Company adver-

Plaintiff's Exhibit No. 3—(Continued)

tising for purposes other than transactions resulting from the Sales Rights granted herein, or otherwise specifically authorized by the Company, and agrees that he will not misrepresent the Company and/or its service in any manner. * * * * * [12]

Obligation for Service

The Sales Agent agrees that the Company's obligation to accept goods, wares and merchandise for transportation is subject to capacity, type of vehicles, facilities, equipment and personnel available, and that the Company is not obligated to transport goods, wares and merchandise by any particular vehicle, train or vessel, or otherwise than with reasonable dispatch.

Advertising

(a) Telephone Directory: The Sales Agent agrees at the earliest opportunity prior to the deadline for accepting advertising in the first issue of his local telephone directory published subsequent to the date of this agreement, to submit to the Company, copy for an advertisement to appear therein. The Sales Agent further agrees that he will contract in his own name and at his own expense for the insertion in such directory and/or subsequent issues thereof, of the copy approved by the Company, as well as the alphabetical listing of the name "National Van Lines, Inc." opposite his telephone number, such advertising to be continued during the term of this agreement.

Plaintiff's Exhibit No. 3—(Continued)

(b) Other: The Company agrees (at its expense) to provide the Sales Agent with available sales literature and/or signs of such type and quantity as it deems of value in promoting the mutual interest of itself and the Sales Agent.

Procedure

The Sales Agent agrees to forward promptly to the Chicago office of the company, located at 2431 Irving Park Road, or such other office as may be subsequently designated by the Company, signed Orders for Services, estimate sheets, purchase orders, and other supporting papers, and/or other essential papers pertaining to [13] any Company transaction, together with any deposits, collections, or other Company funds coming into his possession. The Sales Agent agrees that he will conform with the current practices of the Company relating to the procedure in handling all Company transactions.

Supplies

The Company agrees to furnish (at its expense) the Sales Agent with stationery, forms, tariffs, and supplements essential to the performance of his activities pursuant to this agreement. The Sales Agent agrees that he will provide himself promptly (at his expense) with the necessary Mileage Guides currently in use.

Earnings and Their Payment

The Sales Agent shall be credited with and en-

Plaintiff's Exhibit No. 3—(Continued)

titled to receive from the Company in full payment for all services furnished by himself and/or employees and/or facilities, an amount determined in accordance with the company's "Schedule Of Commissions", current copy of which is attached to and forms a part of this Agreement. Variations, revisions or changes in such "Schedule Of Commissions" caused by changes in Company tariffs become effective at the same time as the tariff changes take place. Any variation, revision or change in the "Schedule of Commissions", either as provided herein or by subsequent agreement between the parties hereto shall not alter the other terms and conditions of this Agreement. In the event of necessary variation, revision, or change in the "Schedule Of Commissions", the Company will furnish the Sales Agent, as soon as possible, with a varied, revised, or changed "Schedule Of Commissions", indicating therein the [14] date upon which it takes effect. Such Sales Agent's earnings become due and payable when the Company has evidence that the shipments upon which earnings are computed are enroute, either from original location direct to final destination, or, where storage is involved at or near point of origin, from warehouse to destination.

Precedence

This Agreement shall supersede, replace, and take precedence over any prior agreement of a similar character between the parties hereto.

Plaintiff's Exhibit No. 3—(Continued)

Termination

This agreement may be terminated at any time upon the written request of the Sales Agent, or the written notice of termination by the Company sent registered mail to the last known address of the Sales Agent, provided, however, that upon such termination the Sales Agent shall immediately:

(a) Return to the General Office of the Company, at his expense, all unused sales literature, and/or signs, and/or selling aids, and/or Company stationery, and/or forms, and/or date pertaining to Company procedure and records.

(b) Discontinue the use of the names "National Van", "National Van Lines", or "National Van Lines, Inc.", in any manner whatsoever. [15]

Term

This agreement shall remain in full force and effect for the period commencing the 7th day of November, 1944 and ending December 31, 1945 and from year to year thereafter, unless terminated by either party as herein provided.

In witness whereof the parties hereto have caused these presents to be executed on this 7th day of November, 1944.

National Van Lines, Inc.
/s/ By F. L. McKee, President

Attest: ....., Assistant Secretary.

Plaintiff's Exhibit No. 3—(Continued)

For Corporate Sales Agent

.....

By.....

Attest: ....., Secretary.

For Individual or Partnership Sales Agent

National Van & Storage Co.,

/s/ By A. E. Dean, Owner

Witness: ..... [16]

Commission Paid to Agent

Earnings shall be paid on a commission basis as shown below:

15% of through line revenue on business signed by the agent and hauled by National Van Lines' equipment from point of origin to point of destination. (Eastbound)

20% of through line revenue on business signed by the agent picked up and held at their warehouse for subsequent service by National Van Lines' equipment. (Eastbound)

10% on all orders signed by the agent and hauled by National Van Lines.

The above commissions are applicable to van shipments only. [17]

Rules Governing Application of Above Rates

Rule 1. Commissions Paid Only on Hauled Business: The applicable rates of commissions shown in columns "A" and "C" of Item 1 are payable only

Plaintiff's Exhibit No. 3—(Continued)

on such business as is actually hauled by the Company; except that, when the Sales Agent, under the authority of a specific and individual arrangement with the Company for any shipment, transports such shipment, the applicable rates of commission for Transportation Service Charges and Divided shipments only, as shown in columns "A" and "C" are payable in addition to the applicable variable and other rates of commission shown in columns "B" and "D".

Rule 2. Personal Business: Personal Business is that business signed by either the Sales Agent personally, or an employee or duly authorized representative of the Sales Agent.

Rule 3. Transportation Service Charges: Transportation service charges are those charges made specifically for transportation and are exclusive of any and all other charges.

Rule 4. Additional Service Charges: Additional Service Charges are those charges made in accordance with current tariffs. When these services are performed by the Company, most of them are rendered at actual cost. For this reason, commissions will be paid only on those charges for which a rate of commission is shown in Item 1 above. [18]

Rule 5. Commission Paid on Western Shipments: The applicable rates of commission shown in column E of Item 1 are payable only on such business as is actually hauled by the Company. Likewise for commission shown in column F of Item 1. The Sales Agent is to receive the rates of commission

Plaintiff's Exhibit No. 3—(Continued)

shown in column B if such service indicated thereby are performed by the Sales Agent.

Rule 6. Charges Prepaid or Advanced for Account of Shipper: Under this classification fall such items as the payment by the Company of storage and warehouse charges at time of loading, or delivery from warehouse at final destination as well as charges for local haul, such charges ultimately being assumed by the shipper. These items are exemplary only, and do not limit the generality of this classification. The ruling of the Company as to whether or not any specific item is a charge of this nature shall be conclusive.

Rule 7. Bid Price: This term is used solely in connection with Government shipments. For the purpose of computing the Sales Agent's earning, it shall include only the cost of Transportation Service.

Rule 8. Adjusted Transportation Service Charges: If for any reason the Company deems it advisable and does have any shipment picked up and temporarily stored for purposes of consolidation and forwarding, the amount of the Transportation Service Charges for the shipment will be reduced by the cost of such services before computing the Sales Agent's sales commission thereon.

Rule 9. Split Commissions: A split commission is a commission divided between two or more Managers and/or Salesmen and/or Sales Agents. The Sales Agent will be governed by any current bulletins on split commissions. [19]

[Endorsed]: Filed Nov. 26, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS, OR IN THE ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT

Comes now the defendant Alfred E. Dean doing business under the firm name and style of National Transfer & Storage Co., by C. P. Von Herzen and S. L. Laidig and Howard B. Turrentine, Esqs., his attorneys, and move the court as follows:

I.

To dismiss the action because the complaint fails to state a claim against this movant upon which relief can be granted. Said motion is based on the pleadings and documents filed herein by the plaintiff, and the movant in support thereof assigns the following reasons:

1. While the plaintiff's complaint is couched in general terms and the word "National" is taken out of its context both with respect to the copyright used by the plaintiff and the method of its use by the defendant, the contract which is appended to plaintiff's complaint and marked Exhibit No. 3 specifically provides that on termination the defendant will discontinue [22] the use of the names "National Van", "National Van Lines" or "National Van Lines, Inc." it affirmatively appears that the use of the name National Transfer & Storage Co. has been by agreement permitted to this movant.

2. The contract which is attached to plaintiff's complaint, and which is denominated plaintiff's Ex-

hibit 3 appears to have written across the face of the contract the words and figures "Canceled 2-20-50" and there appears to be no signature upon said words nor does it appear how or in what manner it was canceled, but on the face of the contract it appears that there is no contract whatever, and therefore the plaintiff's attempt to base his complaint upon the contract is an attempt to breathe life into a canceled document.

II.

In the alternative, this moving defendant respectfully shows that the plaintiff's complaint is so vague and ambiguous that this defendant should not reasonably be required to prepare a responsive pleading to its present form, and defendant therefore moves that the plaintiff be ordered to furnish a more definite statement of the nature of its claim as set forth in its complaint in the following respects:

1. That the plaintiff be required to allege the circumstances and manner under which the words and figures "Canceled 2-20-50" were placed and written upon the face of the alleged contract attached to plaintiff's complaint and marked Exhibit No. 3, and that either said words and figures be satisfactorily explained, or that the plaintiff be required to place his complaint on trial without reference to said contract.

2. That the plaintiff be required to set forth specifically a copy of the defendant's design and name

which the plaintiff alleges to be infringing upon plaintiff's copyright. In that connection this defendant asserts that if the plaintiff is so required to set forth the alleged infringing name and service mark that it will be made to appear ipso facto that such alleged infringement does not exist and thereby the time of the court, counsel and all parties will be conserved. [23]

3. That the plaintiff be required to set forth in paragraph 11 the date and places where it allegedly "repeatedly advised" the defendant of the violation of the plaintiff's rights, etc. This appears to be extremely important in view of the passage of time between the alleged termination of the contract and the date of the filing of the pleading herein.

4. That the plaintiff be required to set forth how or in what manner the contract, which is attached to plaintiff's complaint and marked Exhibit 3, may be enlarged to embrace the alleged "close imitation" of plaintiff's service mark and the service mark "National".

Dated: March 24, 1953.

HOWARD B. TURRENTINE,
C. P. VON HERZEN &
S. L. LAIDIG,

/s/ By C. P. VON HERZEN,

Attorneys for defendant [24]

Affidavit of Service by Mail attached. [26]

[Endorsed]: Filed March 25, 1953.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

In compliance with the Court's ruling requiring plaintiff to amend its complaint plaintiff hereby amends as follows:

In paragraph 10 of plaintiff's Complaint add the following matter at the end thereof:

——The agreement provided for a continuing abstaining by defendant of the use of National Van, National Van Lines, or National Van Lines, Inc. in any manner whatsoever in the event of termination.

That the agreement was terminated according to the provisions thereof by the defendant sending a registered letter of cancellation to plaintiff on February 20, 1950 to confirm a teletype message of cancellation sent February [27] 14, 1950.——

In paragraph 11 of plaintiff's Complaint add the following after the first sentence thereof:

——An example of the defendant's mark comprising National and design, which is the subject matter of this complaint, is attached hereto as plaintiff's Exhibit No. 4.——

At the end of the second sentence in paragraph 11 add the following:

——Such repeated notices were made in a registered letter to National Transfer & Storage Co. dated November 9, 1951 from Kenneth T. Snow, a letter to Mr. Howard B. Turrentine, attorney for

defendant, dated June 5, 1952 from Wilkinson, Huxley, Byron & Hume by Gerrit Groen, and a letter to Mr. Howard Turrentine dated June 13, 1952 from Wilkinson, Huxley, Byron & Hume by Gerrit Groen. The originals of these letters are in the possession of defendant or its counsel.——

Respectfully,

/s/ KENNETH T. SNOW

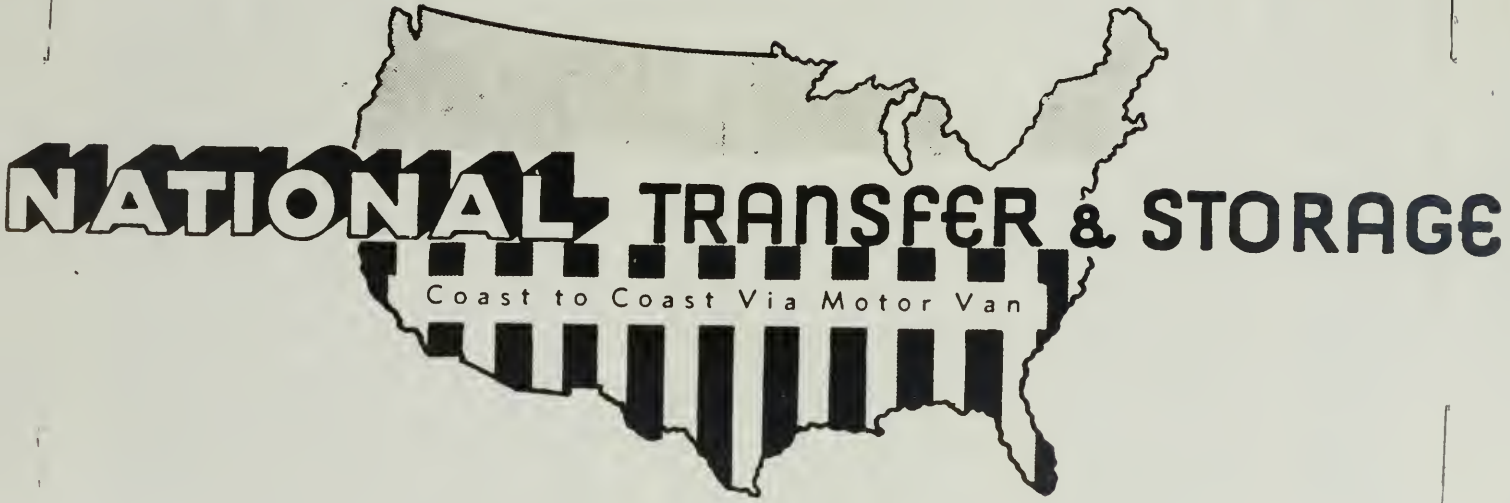
/s/ GERRIT P. GROEN

WILKINSON, HUXLEY,
BYRON & HUME,

ALBERT J. FIHE,

/s/ By ALBERT J. FIHE,
Of Counsel for Plaintiff [28]

[Endorsed]: Filed April 23, 1953.



PLAINTIFF'S EXHIBIT No. 4

[Title of District Court and Cause.]

MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

Comes now the defendant Albert E. Dean doing business under the firm name and style of National Transfer & Storage Co., by Howard B. Turrentine and C. P. Von Herzen & S. L. Laidig, his attorneys, and moves the court as follows:

I.

To dismiss the action because the Complaint and the Amendment to Complaint failed to state a claim against this movant upon which relief can be granted. Said motion is based on the pleadings and documents filed herein by the plaintiff, the complaint and the amendment to complaint filed herein, and the movant in support thereof, assigns the following reasons:

1. (a) It affirmatively appears that the only portion of the plaintiff's alleged service mark that has been granted registry by the United States Patent office is the word "national". (See paragraph 8 of plaintiff's original complaint.) [32]

(b) The plaintiff has failed to state that the mark with respect to the geographical use of the name "national" has become distinctive in the requirement that the use of this word has been exclusive and continuous for a period of five years next preceding the date of the filing of the application for registration. (See Section 2(f), U.S.C.A. 1052).

2. It is clearly implied in the complaint and attached papers that the use of the word "national", as distinguished from the balance of the plaintiff's alleged service mark, has been permitted to this movant by agreement of both the plaintiff and the defendant. (See contract, Exhibit 3 attached to original complaint, page 5, Section (b)).

II.

In the alternative, this moving defendant respectively shows that the plaintiff's complaint and the "Amendment to Complaint" are so vague and ambiguous that this defendant should not reasonably be required to prepare a responsive pleading to their present form, and the defendant therefore moves that the plaintiff be required to furnish a more definite statement as to the nature of its claim as set forth in the complaint and the Amendment to Complaint in the following respects:

1. That the plaintiff be required to allege the facts, circumstances, times and places and the manner under which the use of the words "National Transfer & Storage Co." which appear to be specifically excluded from the contract attached to plaintiff's complaint, as Exhibit No. 3 (page 2, last paragraph) and how the plaintiff proposes to embrace said words in the contract in accordance with the allegations contained in its "Amendment to Complaint" in that connection it would appear that unless plaintiff is able to make such a pleading the time and effort incident to a trial are entirely unnecessary).

2. That the plaintiff be required to limit its complaint to that portion of its alleged service mark consisting of the design, as the use of the geographic work "national" cannot be made the subject of a service mark in view of the lack of exclusiveness of use.

3. The plaintiff having failed to comply with the court's order [33] with respect to paragraph (4) of this moving defendant's previous motion to make more specific and certain, and having failed to make any allegation in connection therewith, this movant reiterates said paragraph as follows:

"(4) That the plaintiff be required to set forth how or in what manner the contract, which is attached to plaintiff's complaint and marked Exhibit 3, may be enlarged to embrace the alleged 'close imitation' of plaintiff's service mark and the service mark 'National'."

Dated: May 11, 1953.

HOWARD B. TURRENTINE,
C. P. VON HERZEN &
S. L. LAIDIG,

/s/ By C. P. VON HERZEN,

Attorneys for defendant [34]

Affidavit of Service by Mail attached. [36]

[Endorsed]: Filed May 11, 1953.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 31, 1953, at Los Angeles, Calif.

Present: The Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: none; Counsel for Plaintiff: no appearance; Counsel for Defendant: no appearance.

Proceedings: It is ordered that defendant's motion to dismiss the complaint and amendment to complaint, or in the alternative, for more definite statement, heretofore taken under submission, be, and hereby is denied.

Clerk will notify counsel.

EDMUND L. SMITH,
Clerk [37]

[Title of District Court and Cause.]

ANSWER

Comes now Alfred E. Dean, and answering plaintiff's complaint on file herein, admits, denies and alleges as follows:

1. Answering paragraph 2 of plaintiff's complaint, this answering defendant denies each and every allegation therein contained, except that prior to the summer of 1953 he did do business under the name and style of National Transfer and Storage Company, and in that connection further alleges

that since the summer of 1953 he has been doing business under the name and style of Dean Van Lines.

2. Answering paragraph 3 of plaintiff's complaint, this answering defendant admits the allegations therein contained, except that the parties are citizens of different states, and except that the amount involved exceeds the sum of $3,000.00, and in that respect denies the allegations of said complaint.

3. Answering paragraph 4 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation [38] therein contained.

4. Answering paragraph 5 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained.

5. Answering paragraph 6 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained.

6. Answering paragraph 7 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained.

7. Answering paragraph 8 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained.

8. Answering paragraph 9 of plaintiff's complaint, this answering defendant admits the execution of the agreement dated November 7, 1944; as to the remainder of the allegations contained in said paragraph, this answering defendant generally and specifically denies each and every allegation therein contained.

9. Answering paragraph 10 of plaintiff's complaint, this answering defendant admits the termination of the agreement in the year 1950, as to the remainder of the allegations contained in said paragraph this answering defendant generally and specifically denies each and every allegation therein contained.

10. Answering paragraph 11 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained.

11. Answering paragraph 12 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained.

12. Answering paragraph 13 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained. [39]

Wherefore, defendant prays that plaintiff take nothing by its action on file herein, and that he may have and recover the costs of this suit including a

reasonable attorneys' fees and for all other proper relief.

HOWARD B. TURRENTINE,
C. P. VON HERZEN &
S. L. LAIDIG,

/s/ By C. P. VON HERZEN,

Attorneys for defendant [40]

Duly Verified.

Affidavit of Service by Mail attached. [41]

[Endorsed]: Filed Feb. 3, 1954.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: March 1, 1954, at Los Angeles, Calif.

Present: The Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: Virginia Wright; Counsel for Plaintiff: Ernest Shelander; Counsel for Defendant: C. P. Von Herzen.

Proceedings: For setting.

It is ordered that cause is set for pretrial June 15, 1954, 2 p.m., and for trial Oct. 26, 1954, 10 a.m.

EDMUND L. SMITH,
Clerk [42]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: June 15, 1954, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: Virginia Wright; Counsel for Plaintiff: Albert J. Fihe; Counsel for Defendant: C. P. Von Herzen.

Proceedings: For pretrial. (In Chambers).

Plf's Ex. 1 and 2 are received into evidence.

Plf's Ex. 3, 4, 5, 6, 7-A, 7-B, and 9 are received into evidence.

Plf's. Ex. 8 and 10 are marked for ident. only.

Plf's Ex. 11, 12, 13, and 14, are marked for ident. only.

Plf's Ex. 15 is received into evidence.

Plf's Ex. 16 and 17 are marked for ident.

Deft's Ex. A and B are received into evidence.

EDMUND L. SMITH,
Clerk [43]

June 21, 1955

Mr. Albert J. Fihe, 1023 Victory Place, Burbank, California.

Mr. Gerrit P. Groen, 38 So. Dearborn Street, Chicago, Illinois.

Mr. Collins Mason, 811 West 7th Street, Los Angeles, California.

Mr. C. P. Von Herzen, 453 So. Spring Street, Los Angeles, California.

Re: National Van Lines, Inc., vs. Alfred E. Dean, etc., Case No. 14,783-T Civil

Gentlemen:

Please be advised a minute order has been entered in the above-entitled matter, this date, upon the direction of Judge Tolin, that the court finds in favor of the defendant and orders judgment accordingly, counsel for the defendant to prepare findings of fact and conclusions of law and judgment under Local Rule 7, and to have judgment for costs.

Very truly yours,

JOHN A. CHILDRESS,
Clerk

By WM. A. WHITE,
Deputy Clerk [44]

[Title of District Court and Cause.]

FIRST AMENDED ANSWER

Comes now the defendant, above named, and for first amended answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

1. Answering paragraph 2, this defendant denies the allegations therein contained save and except that he admits that from a time in or about the month of November, 1944, to in or about the middle of 1953 he did business under the name and style of National Transfer and Storage Company.

2. Answering paragraph 3, this defendant admits the same save and except that it denies that the amount involved, [45] exclusive of interest and costs, exceeds the sum of Three Thousand ($3,000.00) Dollars.

3. Answering paragraphs 4, 5, 6 and 7, this defendant is without knowledge, information or belief as to the allegations therein contained sufficient to enable him to answer the same and, therefore, denies generally and specifically each and every allegation therein contained.

4. Answering paragraph 8, this defendant denies generally and specifically each and all of the allegations therein contained save and except that defendant admits that on September 11, 1951, plaintiff caused to be registered in the United States Patent Office, as an alleged service mark, the composite name "National Van Lines, Inc.", together with an alleged shield depicting the national colors

of the United States; and that on September 9, 1952, plaintiff caused to be registered in the United States Patent Office, as an alleged trade-mark, the composite name "National Van Lines, Inc."

5. Answering paragraph 9 of plaintiff's complaint, this answering defendant admits the execution of the agreement dated November 7, 1944; as to the remainder of the allegations contained in said paragraph, this answering defendant generally and specifically denies each and every allegation therein contained.

6. Answering paragraph 10, this defendant admits the same.

7. Answering paragraph 11, this defendant denies generally and specifically each and every allegation therein [46] contained.

8. Answering paragraph 12, this defendant denies generally and specifically each and all the allegations therein contained save and except that he admits that from in or about November, 1944, to about the middle of 1953 defendant engaged in business of shipping household and other goods by motor van under the name National Transfer and Storage Co., in conjunction with which name defendant has since, in or about the year 1951, displayed a representation of a map of the United States bearing color marks denoting the national colors of the United States. Further answering said paragraph, defendant alleges that in or about the middle of 1953, defendant changed the name of his said business to "Dean Transfer and Storage Co."

9. Answering paragraph 13, this defendant de-

nies generally and specifically each and every allegation therein contained.

10. Further answering said complaint, defendant denies that he has infringed or is infringing or threatens to infringe upon any trade-mark or service mark owned by plaintiff.

11. Further answering said complaint, defendant denies that he has committed, is committing, or threatens to commit any act of unfair competition.

12. Further answering said complaint, defendant denies that he has violated or is violating said agreement of November 7, 1944, or any agreement with plaintiff. [47]

13. Further answering said complaint, and as a first separate defense thereto, defendant alleges that plaintiff's said pretended trade-marks and the said claimed registrations thereof, are invalid and void for each of the following reasons:

(a) That the word "National" is merely descriptive and is incapable of exclusive appropriation as a trade-mark;

(b) That the colors red and white arranged as alternate parallel stripes in conjunction with a field colored blue, constitute the national colors of the United States as well as an essential part of the flag and seal of the United States, and are incapable of exclusive appropriation as a trade-mark;

(c) That the word "National" has for such a long time been in such wide and varied use by so many different concerns in the United States as a part of firm and corporate names and as a pretended trade-mark and as a part of trade-marks,

that the public has long since ceased to associate said word with any particular concern, or with the goods or services of any particular concern;

(d) That shields and escutcheons wherein alternate red and white parallel stripes are arranged perpendicular to a blue field, have been in such wide and varied use by so many different concerns in the United States as embellishments for trade-marks, trade-names and advertisements and parts thereof that the public has long since ceased to associate such shields or escutcheons with any particular concern or with the goods or services of any particular concern;

14. Further answering said complaint, and as a second separate defense thereto, defendant alleges that plaintiff misled and induced the Commissioner of Patents of the United States to grant to it said trade-mark registrations Nos. 548,018 and [48] 563,-950, by falsely representing to said Commissioner of Patents that plaintiff had enjoyed exclusive use of said term "National" and said shield forming a part of said registration No. 548,018, as trade-marks, when, in fact, said term "National" as well as said shield have for many years been commonly used by various concerns in the United States; and that therefore plaintiff is estopped to assert ownership of said pretended trade-marks in a Court of Equity.

15. Further answering said complaint, and as a third separate defense thereto, defendant alleges that plaintiff is estopped to be heard to assert or claim that defendant's use of the name "National

Transfer & Storage Company" constitutes any violation of any right of, or unfair competition against, plaintiff, for the reason that defendant adopted and used said name with the full knowledge, acquiescence and consent of plaintiff, and that plaintiff failed to object to defendant's use of said name until after defendant had extensively used said name as the name of defendant's business for a period of approximately eight years and until defendant had built up and acquired a valuable good will associated with said name.

Wherefore, defendant prays that plaintiff's complaint be dismissed, that defendant recover his costs and disbursements herein and that defendant have such further relief as the Court may deem just and equitable.

ALFRED E. DEAN,
trading under the firm name and style of National Transfer & Storage Co., Defendant

By HOWARD B. TURRENTINE,
C. P. VON HERZEN, S. L. LAIDIG,
and MASON & GRAHAM

/s/ By COLLINS MASON,

Attorneys for Defendant [49]

Affidavit of Service by Mail attached. [50]

[Endorsed]: Lodged Oct. 4, 1954. Filed Oct. 11, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on for trial before the Court commencing December 16, 1954, the Court, having heard and considered the evidence and briefs presented by the respective parties, and being fully advised in the premises, makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff, National Van Lines, Inc., is an Illinois corporation having its principal place of business in Chicago, Illinois. [51]

2. Defendant, Alfred E. Dean, doing business as National Transfer & Storage Co., resides and has his principal place of business in San Diego, California. Approximately six months before the trial of this action, (and approximately one and one-half years after this suit was filed) defendant changed his assumed business name from "National Transfer & Storage Co." to "Dean Van Lines" and is no longer using the name "National Transfer & Storage Co."

3. Plaintiff, National Van Lines, Inc., operates a motor van line engaged in the transportation of household goods in interstate commerce. Much of plaintiff's business is booked by various other transfer companies, while acting as booking agents for

plaintiff, also carry on their own independent transfer businesses under their own names.

4. Plaintiff began interstate business in 1928 as "National Shippers & Movers" and in 1934 incorporated as "National Van Lines, Inc."

5. Plaintiff displays upon its moving vans and other material a vertical stripe design in conjunction with the name "National".

6. Plaintiff has secured registrations on the Principal Register, in the United States Patent Office as follows:

No. 548,018, dated September 11, 1951 for [52] the composite mark "National" and a vertical stripe design;

No. 563,950, dated September 9, 1952, for "National".

7. Plaintiff's use of the word "National' 'is primarily as a part of the composite name "National Van Lines, Inc."

8. The word "National" alone or in conjunction with "Van Lines, Inc." is recognized by the public to exclusively identify plaintiff or plaintiff's services of moving household goods by motor van.

9. The vertical stripes do not cause the public to particularly identify plaintiff or plaintiff's services of moving household goods by motor van.

10. Defendant began the transfer and storage business in 1936 in California and operated under various names such as "Golden State Van & Storage" and "Coast Van Lines". On October 28, 1944

defendant adopted the trade name "National Van & Storage" pending negotiations wth plaintiff for an agency license, and ten days later entered into an agency license agreement with plaintiff. Shortly thereafter defendant adopted the name "National Transfer & Storage Co." Defendant's initial operations were largely concentrated in California but subsequently were expanded to coast-to-coast interstate use.

11. On November 7, 1944 plaintiff entered into a written contract (Exhibit 5) with the defendant, which contract remained in full force and effect until February 20, 1950. By virtue of [53] such contract, plaintiff engaged defendant as a booking agent upon a commission basis to book interstate shipments for plaintiff in plaintiff's name, to be handled by plaintiff's moving vans, while at the same time defendant was carrying on his own transfer business. Such contract was executed by defendant under the name "National Van & Storage Co." and contained provisions to the effect that defendant would not use "National Van", "National Van Lines", "National Van Lines, Inc.", "or any combination thereof", "or the Company insignia * * *". In 1949 just before the cancellation of the agreement, defendant added a vertical stripe design to his "National" name because "It had a lot of trademark value". On November 9, 1951 plaintiff complained to defendant of defendant's use of the "National" name and the vertical stripe design.

12. The design used by defendant, consisting of an outline map of the United States, displaying

vertical stripes, is distinctly different from plaintiff's design comprising vertical stripes in a shield design.

13. The record contains evidence of confusion but it is not of such character as to warrant an injunction.

14. Defendant's adoption and use of a vertical stripe design is not an infringement against plaintiff.

15. Defendant has not committed any acts or unfair competition against plaintiff.

16. Defendant's use of "National" after termination of the [54] agreement is a violation of the termination provisions of the contract.

Conclusions of Law

1. This action arises under the trade mark laws of the United States and is for unfair competition.

2. This court has jurisdiction of the parties.

3. Plaintiff's registration No. 563,950 is valid and infringed.

4. Plaintiff's Registration No. 548,018 is invalid.

5. Plaintiff is entitled to judgment against defendant's use of "National" as a part of his mark or trade name.

6. Plaintiff cannot claim any exclusive right in the vertical stripe design as part of its mark.

7. Defendant is entitled to judgment with respect to all issues involving the charges of trade mark infringement and unfair competition except with respect to his use of the word "National".

8. Defendant is entitled to judgment for costs.

Los Angeles, California, ..., 1955.

.....,
United States District Judge [55]

[Endorsed]: Lodged Aug. 9, 1955.

[Title of District Court and Cause.]

JUDGMENT

This action having come on for trial before the Court commencing December 16, 1954, the Court, having heard and considered the evidence and briefs presented by the respective parties, having made and entered findings of fact and conclusions of law herein, and being fully advised in the premises,

It is hereby adjudged and decreed as follows:

1. Defendant, and all holding by, through and under him, are permanently enjoined and restricted from using "National" as the dominant part of a mark or trade name.

2. United States registration No. 563,950 is valid and infringed. [56]

3. United States registration No. 548,018 is invalid and void.

4. Plaintiff's complaint herein is dismissed as to all issues except as to the relief sought with respect to the word "National".

5. Defendant shall recover the usual taxable Court costs to be determined.

Dated at Los Angeles, California this ..... day of ....., 1955.

.....,
United States District Judge [57]

[Endorsed]: Lodged Aug. 9, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS SUGGESTED ALTERNATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Memorandum is submitted in support of the alternate Findings of Fact and Conclusions of Law submitted by Plaintiff. The findings and conclusions of defendant are deemed to be inaccurate and incomplete in many respects. In submitting the alternate findings, Plaintiff has followed the outline of Defendant's Findings.

For convenience the following comments will be directed to each of Defendant's proposed findings and conclusions in the same order. [58]

Defendant's Finding No. 1: (Plaintiff's Finding No. 1). No change.

Defendant's Finding No. 2: This has been modified by adding additional pertinent facts. (Plaintiff's Finding No. 2).

Defendant's Finding No. 3: This is a conclusion of law rather than a finding and has accordingly been transferred to the conclusions.

Defendant's Finding No. 4: The only change made consists of adding the word "motor" prior to van line in order to accurately state the specific fact. (Plaintiff's Finding No. 3).

Defendant's Finding No. 5: As stated, this finding is entirely erroneous because it omitted the pertinent fact as to Plaintiff's first use of the "National" name in interstate commerce. It has been accurately restated. (Plaintiff's Finding No. 4).

Defendant's Finding No. 6: This finding is entirely inaccurate and even if the facts of record referred to by Defendant were correctly stated, such facts must be objected to as based on testimony which is wholly inadmissible. Plaintiff's objections to this testimony stand.

Defendant's Finding No. 7: This proposed finding is also inaccurate and incomplete. Further, it is objectionable as being argumentative and an attempt to state a conclusion. Nowhere in the record is there a scintilla of evidence which suggests that plaintiff used "National" as part of its name to describe its services. [59]

Defendant's Finding No. 8: As stated by Defendant, it is entirely inaccurate. Again the record is completely devoid of any suggestion that Plaintiff used the official shield of the United States as its trade mark. The facts have accurately been restated. (Plaintiff's Finding No. 5).

Defendant's Findings No. 9 and 10: Plaintiff has accurately restated the facts in its proposed single Finding No. 6. Defendant's proposed Finding No. 9 and 10 are again contrary to the facts of record.

This is evident from a simple inspection of the Registrations in suit, Plaintiff's Exhibits 3 and 4.

Defendant's Finding No. 11: This has been restated as Plaintiff's Finding No. 7. The record abounds with evidence showing that Plaintiff used "National" (not "national") as the dominant part of its service mark and trade name and not as a descriptive term. The record also clearly establishes that Defendant used "National" in the same manner.

Defendant's Finding No. 12: This alleged finding is an argumentative interpretation. It is improper and irrelevant and should be deleted.

Defendant's Finding No. 13: This proposed finding is in part inaccurate and in part contrary to the facts of record. It is also wholly irrelevant and based upon inadmissible testimony. There can be no reasonable dispute about the fact that each party has used "National" strictly as a mark and dominant part of its business name. The Court stated during the trial:

"No one would probably contend here that National Biscuit Company, for instance, or National Lead [60] are infringing upon this Plaintiff, or that this Plaintiff is infringing upon theirs. They all have valid marks, which is the word "National".

The Court then continued:

"Now I will tell you and Mr. Groen what my tentative thought is about it. It seems to me that the Defendant by the use of his "National Transfer & Storage" has prima facie infringed "National Van

Lines'' because of the direct competition. And there has been some evidence of confusion already.''

For these reasons Defendant's proposed Finding 13 should be eliminated entirely.

Defendant's Finding No. 14: This finding also is based on inadmissible evidence strenuously objected to by Plaintiff at the trial. Even if the evidence were admissible, it establishes that designs, even though they incorporate features similar to flags or known shields, have excellent trade mark significance.

Defendant's Finding No. 15: Plaintiff substitutes Finding No. 8 for this finding. Again, as Defendant has attempted to state the facts, they are inaccurate, argumentative and based upon Defendant's suppositions. To complete the findings on this subject, Plaintiff also added proposed Finding No. 9.

Defendant's Finding No. 16: Plaintiff has restated this as its Finding No. 10. Defendant's finding is incomplete in that it omits important dates and names.

Defendant's Finding No. 17: Defendant's finding is again inaccurate and incomplete and also contains argumentative and irrelevant statements. Plaintiff has therefore restated it as its Finding No. 11. As [61] restated by Plaintiff, the finding is concise, strictly factual and complete. To illustrate the argumentative nature of Defendant's finding, attention is invited to the statement wherein Defendant attempts to interpret Mr. Dean's state of mind at the time he signed the contract. Obviously this is improper.

Defendant's Finding No. 18: This finding has been restated to correctly reflect the facts and avoid the argumentative statements of Defendant. It has been restated as Plaintiff's Finding No. 12.

Defendant's Finding No. 19: This proposed finding is entirely contrary to the record, repeatedly Plaintiff and Defendant acknowledged the fact that each used "National" as a mark and trade name.

Defendant's Finding No. 20: This finding is also contrary to the record. The record contains much evidence of confusion and there are also instances of record as to deliberate confusion by Defendant palming off his services as Plaintiff's. For example see the Stokely incident (San Francisco Deposition, R. W. Adams, Pps. 16-21). In view of the record of confusion, Plaintiff submits Finding No. 13.

Defendant's Finding No. 21: This finding is also entirely contrary to the facts of record and for the sake of accuracy should be deleted. Its substance has been included in Plaintiff's Finding No. 13.

Defendant's Finding No. 22: This finding is in sharp contrast to the facts of record. Plaintiff did not organize the "National Transfer & Storage Company" of Sacramento, California. Organization and ownership of this company by Plaintiff was denied by Mr. McKee when examined by Defendant's counsel. (See record beginning at [62] Pg. 147.)

Defendant's Finding No. 23: This finding must be modified to accurately state the facts of record. Plaintiff in turn submits Finding No. 14.

Defendant's Finding No. 24: No change. Adopted as Plaintiff's Finding No. 15.

Defendant's Finding No. 25: This finding as submitted by Defendant is inaccurate in view of the facts of record and the statement of the Court found on Page 91 of the record. Plaintiff submits Finding No. 16 as a substitute.

Defendant's Conclusions of Law: Defendant has not followed the proper form for Conclusions of Law as required by the Rules of Civil Procedure. To properly dispose of the issues, conclusions must be made with respect to the validity or invalidity of the Plaintiff's registrations in issue. The conclusions of law submitted by Plaintiff are believed to be accurate and in keeping with the record and the pronouncements of this Court at the time of the trial and in the minute order of June 21, 1955.

Conclusion

In submitting its proposed findings and these comments, Plaintiff has made every attempt to be concise and accurate and to fairly present findings in keeping with the undisputed facts of the record. Particular attention is invited to the fact that Plaintiff has here relied upon the Court's statement made during the trial, particularly the statement found beginning at Page 91 of the Record, where the Court stated in part:

"It seems to me that the Defendant by the use of [63] his 'National Transfer & Storage' has prima facie infringed National Van Lines because

of the direct competition. And there has been some evidence of confusion already."

The results as summarized by Plaintiff's Findings and Conclusions, is in keeping with what the Plaintiff believes to be the Court's intent. Although Defendant may urge that the issue as to the word "National" is moot because Defendant has allegedly discontinued the use of it, Plaintiff takes the position that it is entitled to an adjudication of this issue as it is based on facts in existence at the time the suit was filed and which continued until almost the time of trial.

Respectfully,

/s/ ALBERT J. FIHE

/s/ KENNETH T. SNOW

WILKINSON, HUXLEY,
BYRON & HUME,

/s/ By GERRIT P. GROEN,

Attorneys for Plaintiff [64]

[Endorsed]: Filed Aug. 9, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on for trial before the Court commencing December 16, 1954, the Court, having heard and considered the evidence and briefs

presented by the respected parties, and being fully advised in the premises, makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff, National Van Lines, Inc., is an Illinois corporation having its principal place of business in Chicago, Illinois. [69]

2. Defendant, Alfred E. Dean, doing business as National Transfer & Storage Co., resides and has his principal place of business in San Diego, California.

3. This Court has jurisdiction of the parties and of the subject matter of this action.

4. Plaintiff, National Van Lines, Inc., operates a van line engaged in the transportation of household goods in interstate commerce. Much of plaintiff's business is booked by various other transfer companies throughout the country, which transfer companies, while acting as booking agents for plaintiff, also carry on their own independent transfer businesses under their own names.

5. Plaintiff, National Van Lines, Inc., was incorporated and commenced business in Illinois in or about the month of June 1934.

6. When plaintiff adopted said name "National Van Lines" in 1934, said name was in use by another company, "National Van Lines", operating a van line in interstate commerce out of Milwaukee, Wisconsin, which said other company had been so operating since in 1930 and is still so operating.

7. Plaintiff adopted and has used the prefix "national" [70] in its name in the sense of a geographical adjective to denote that its van line is operated upon a national scale, and plaintiff's composite name "National Van Lines, Inc." is merely descriptive, denoting that plaintiff is a corporation operating a nationwide van line service.

8. Plaintiff also displays upon its moving vans and stationery a close simulation of the official shield of the United States.

9. On May 17, 1948 plaintiff filed in the United States Patent Office an application for registration, as a service mark, of the composite name "National Van Lines, Inc." together with said simulation of the official shield of the United States, and after prosecution proceedings in the Patent Office during which, upon the requirements of the Commissioner of Patents, plaintiff filed a disclaimer limiting the mark to the said composite mark as shown in the application, received therefor registration certificate No. 548,018.

10. On January 4, 1952 plaintiff filed in the United States Patent Office an application to register, as a service mark, the word "national", but, upon the requirement of the Commissioner of Patents, plaintiff amended said application to include the composite name "National Van Lines, Inc." and, by disclaimer, limited said mark to said composite term. After said proceedings in the United States Patent Office, plaintiff received registration certificate No. 563,950. [71]

11. Plaintiff has not used the word "national"

except as a part of the composite descriptive name "National Van Lines, Inc."

12. Plaintiff has not used the national colors or stripes of our flag except as a part of the close simulation of the official shield of the United States used by plaintiff.

13. The word "national" is primarily a geographical adjective, immediately suggests itself as the prefix of the name of any business operating upon a nationwide scale, and when so used, as it is used by both plaintiff and defendant, it is neither fanciful nor distinctive, nor capable of appropriation by any one concern to the exclusion of others. In addition to plaintiff's and defendant's use of the word in that sense, the evidence establishes that it is notoriously commonly used by thousands of other business concerns in the same sense. Current telephone directories of only nine cities of the United States show approximately 4,000 listings of such concerns, and the trade mark records of the United States Patent Office contain over 600 registrations of trade marks containing the word "national". Among the various transfer and transportation companies in the United States using said geographical prefix in their business names are:

"National Van Lines" (of Milwaukee, Wisconsin) since during 1930;

"National Transportation Co." (a Connecticut Corporation) since October 1920; [72]

"National Moving and Warehouse Corporation" (a New York corporation) since June 1941;

"National Carloading Corporation" (a New York corporation) since January 1932;

"National Movers, Inc." (a New Jersey corporation) since March 1948;

"National Cartage Co." (an Illinois corporation) since November 1946;

"National Freight, Inc." (a New Jersey corporation) since August 1944;

"National Trucking Co." (a Florida corporation) since May 1931;

"National Freight Lines, Inc." (an Illinois corporation) since February 1938.

14. It is, and has been since a time long prior to plaintiff's first use of a simulation of the official shield of the United States, common practice for various concerns in the United States to use simulations of said shield in connection with their trade marks and trade names. Such shield simulations comprise part of some 170 trade mark registrations issued by the United States Patent Office. In the transfer and storage field, such a shield has been continuously used since 1919 and is still in use by the Piehl Transfer & Storage Company upon its moving vans operating in interstate commerce out of Portland, Oregon, and [73] such simulations of said shield have long been and still are in use by other transfer companies operating in California.

15. The word "national" alone or in conjunction with representations of the colors of the United States in the form of red and white stripes, is not exclusively associated by the public with plaintiff or plaintiff's services.

16. Defendant commenced his transfer and storage business in California in October 1944 under the name "National Van & Storage Co." While defendant's principal operations are within the State of California, defendant also operates nationally by interline arrangements with other transfer companies.

17. On November 7, 1944, with full knowledge of defendant's use of said name "National Van & Storage Co." and with full knowledge of the fact that defendant was operating and would continue to operate his own independent transfer business under such name, plaintiff entered into a written contract, Exhibit 5, with the defendant, which contract remained in full force and effect until February 14, 1950. By virtue of said contract plaintiff engaged defendant as a booking agent, upon a commission basis, to book interstate shipments for plaintiff in plaintiff's name to be handled by plaintiff's moving vans, while at the same time defendant was, with plaintiff's knowledge and acquiescence, carrying on and building up his own transfer business in his own said business name. Said contract was executed by defendant under the name "National Van & Storage Co." and contained a provision to the effect that defendant would not use in his own business name [74] either of the following combinations of words; "National Van", "National Van Lines" or "National Van Lines, Inc." To comply with said provision of said contract, defendant, in November 1944, promptly changed his said business name from "National Van & Storage Co." to

"National Transfer & Storage Co.", which was done with plaintiff's knowledge and acquiescence. During 1949, with plaintiff's knowledge and acquiescence, defendant designed and commenced using on his moving vans and stationery a fanciful and distinctive symbol consisting of an outline map of the United States displaying red and white stripes on the bottom portion of the map. Defendant, with plaintiff's knowledge and acquiescence, has continued throughout the years to operate and build up his own said individual transfer business under said name from a four-moving-van business grossing $8,889.81 in 1944 to an 83-moving-van business grossing $688,267.27 during the first eleven months of 1951, during which time defendant materially increased his investment in his said business. It was not until November 9, 1951 that plaintiff complained to defendant of defendant's use of said name and symbol and it was not until approximately one year after said complaint that plaintiff instituted this action.

18. The symbol used by defendant, consisting of an outline map of the United States displaying on its bottom portion red and white stripes, is distinctively different from the simulation of the official shield of the United States used by plaintiff.

19. The business name of defendant, "National Transfer & Storage Co." is merely descriptive of the scope and nature of defendant's operations and, apart from the geographically [75] descriptive prefix "National" used by both plaintiff and defendant for denoting the scope of their respective opera-

tions, their composite names have no similarity in sound or appearance.

20. Defendant has not committed any act designed or intended to palm off his services as those of plaintiff, or any act intended or designed to deceive, mislead or create any confusion in the mind of the public, but, on the contrary, defendant in good faith and with plaintiff's knowledge and acquiescence, adpoted and built up his own business under the descriptive name "National Transfer & Storage Co." and said map symbol, and in so doing has made only fair and lawful use of the generic words comprising said name.

21. Other than possible isolated instances of confusion which might be expected to result among careless observers from the fair and truthful use by plaintiff and defendant, as well as many other transfer companies, of purely descriptive names having a common geographical prefix, there is no likelihood of any confusion occurring in the public mind as between plaintiff and defendant or their services.

22. After said contract, Exhibit 5, was terminated, plaintiff, without defendant's knowledge or consent, caused to be formed in Sacramento, California, another transfer company under the name "National Transfer & Storage Co.", which said company has since continued to operate under said name. [76]

23. Defendant has not committed any act of trade mark infringement against plaintiff.

24. Defendant has not committed any act of unfair competition against plaintiff.

25. Defendant has not in any way violated any provision of said contract, Exhibit 5, between plaintiff and defendant.

26. Approximately six months before the trial of this action, defendant changed the name of his said business from "National Transfer & Storage Co." to "Dean Van Lines" and is no longer using the name "National Transfer & Storage Co."

Conclusion of Law

Defendant is entitled to judgment dismissing plaintiff's complaint and for defendant's taxable costs.

/s/ ERNEST A. TOLIN,
United States District Judge

[Endorsed]: Filed Oct. 19, 1955.

In the United States District Court for the Southern District of California, Central Division

No. 14783-T

NATIONAL VAN LINES, INC., Plaintiff,

vs.

ALFRED E. DEAN, trading under the firm name and style of National Transfer & Storage Co., Defendant.

JUDGMENT

This action having come on for trial before the Court commencing December 16, 1954, the Court, having heard and considered the evidence and briefs presented by the respective parties, having made and entered findings of fact and conclusions of law herein, and being fully advised in the premises,

It is hereby adjudged and decreed as follows:

1. Plaintiff's complaint herein is hereby dismissed.

2. Defendant shall recover his taxable costs herein in the sum of $639.44.

Dated at Los Angeles, California this 19th day of July, 1955.

/s/ ERNEST A. TOLIN,
United States District Judge [78]

[Endorsed]: Filed and Entered Oct. 19, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that National Van Lines, Inc., Plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 19th day of October, 1955.

Burbank, California, October 27, 1955.

Respectfully,

/s/ ALBERT J. FIHE,
of Counsel for Plaintiff
KENNETH T. SNOW,
GERRIT P. GROEN,
WILKINSON, HUXLEY,
BYRON & HUME,
Chicago Attorneys for Plaintiff [79]

[Endorsed]: Filed Oct. 31, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know all men by these presents, that we, National Van Lines, Inc., as Principal, and the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and authorized to act as surety under the Act of Congress approved August 13, 1894, whose principal office is located in Baltimore, Mary-

land, as Surety, are held and firmly bound unto Alfred E. Dean, doing business as National Transfer & Storage Co., in the full and just sum of Two Hundred fifty and no/100 Dollars ($250.00), lawful money of the United States, to be paid to the said Alfred E. Dean, doing business as National Transfer & Storage Co., for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

The condition of this obligation is such, that

Whereas, the above named National Van Lines, Inc., Plaintiff herein, has appealed or is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment made and [80] entered against the Plaintiff in the above entitled Court and in the above entitled action, on or about the ..... day of ....., 1955.

Now, therefore, in consideration of the premises and of such appeal, if the said Plaintiff, National Van Lines, Inc., shall prosecute its appeal to effect, and pay all costs that may be adjudged against it if the appeal is dismissed or the judgment is modified, then the above obligation to be void; otherwise to remain in full force and virtue, and in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten (10) days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 28th day of October, 1955.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

/s/ By ROBERT HECHT,

Attorney in Fact

Examined and recommended for approval as provided in Rule 8.

/s/ ALBERT J. FIHE, Attorney

Approved this 31st day of Oct., 1955, John A. Childress, Clerk, by Charles E. Jones, Deputy. [82]

[Endorsed]: Filed Oct. 31, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION TO EXTEND TIME FOR COMPLETING AND FILING APPEAL

Comes now the Plaintiff and moves this Honorable Court for an order extending the time for completing and filing the Appeal for approximately fifteen (15) days or until December 23, 1955.

Undersigned counsel for Plaintiff has just been notified by the Clerk of the United States District Court that certain papers listed in Plaintiff's Designation of Record on Appeal are not at present available for the Clerk to include in the material to be sent to the Circuit Court of Appeals of the Ninth Circuit.

This material comprises Defendant's Proposed Findings of Fact and Conclusions of Law. It seems that these documents have never been officially filed with the Court. [91a]

It further appears that such filing will be accomplished within the next few days upon which the records can be completed.

A copy of this motion has been mailed to Collins Mason, 811 West 7th Street, Los Angeles 17, California and another copy to C. P. Von Herzen, 453 South Spring Street, Los Angeles 13, California, Attorneys for Defendant.

Burbank, California, December 9, 1955.

/s/ ALBERT J. FIHE,
Of Counsel for Plaintiff

Order

The above motion is approved and it is ordered that Plaintiff have until December 23, 1955 to complete and file its Appeal Record.

Los Angeles, California, December 12, 1955.

/s/ ERNEST A. TOLIN,
Judge, United States District Court

[Endorsed]: Filed Dec. 12, 1955.

[Title of District Court and Cause.]

DOCKET ENTRIES

11/26/52—Fld compl for infringement of trademark. Issd Sums. Made Report JS-5.

12/ 8/52—Fld Sums—retn svd.

12/23/52—Fld stip & ord thereon that dft hv to & incl 1/22/53 to plead.

1/26/53—Fld stip & ord thereon that dft hv to & incl 2/24/53 in wh to ans.

2/26/53—Fld stip & ord thereon that dft hv to & incl 3/24/53 to plead.

3/25/53—Fld mot & not of mot of dft to dism, etc, retble 4/6/53, 10 a.m. with pts & auths thereof.

4/ 6/53—Ent prcdgs & ent ord dnyg defts mot to dism & grntg that portion of mot for more definite stmt.

4/23/53—Fld amendment to compl.

5/11/53—Fld mot of deft & not of mot retble 5/23/53 at 10 a.m. to dism complt together with memo of pts & auths in suppt thereof.

5/20/53—Fld pltfs memo in oppn to defts mot for summy jdgmt.

5/25/53—Ent ord hrg on mots ord off cal.

9/11/53—Mld notice to counsel plcg on cal 10/5/53 10 a.m., hrg on defts mot to dism compl or in alt for more def stmt, hrtf fld 5/11/53.

10/ 5/53—Ent procdgs hrg defts mot to dism compl & amendmt to complt or in alt for more def stmt. Ent ord deft hv to 10/9/53 to file addl memo & pltf hv to 10/16/53 in wh to reply, thereafter mots std subm.
10/12/53—Fld defts suppl pts & auths.
10/13/53—Fld pltfs reply memo.
10/15/53—Fld stip & ord pltf hv to & incl 10/26/53 to file addnl reply memo.
10/26/53—Fld pltfs reply to defts mot to dism or in alt for mor def stmt.
12/31/53—Ent ord defts mot to dism compl & amendmt to complt etc., htf tkn under subm, denied. Counsel notif.
1/15/54—Fld pltf's not of rulg on deft's mot to dism.
1/16/54—Fld not of ruling.
2/ 3/54—Fld Answer. [93]
2/10/54—Mld notice to counsel placg on cal for settg 3/1/54, 10 a.m.
3/ 1/54—Ent procs & ord settg for pretrial hrg 6/15/54 2 p.m. & for trial 10/26/54, 10 a.m. Issd pretrial ord.
6/ 7/54—Fld Stip re pretrial hearg papers.
6/10/54—Fld Pltf's simpplication of issues & pltf's memo-brief narrative stmt of facts.
6/11/54—Fld Deft's pretrial memo.
6/15/54—Ent prcdgs pretrial hrg (in chambers). Fld 17 exbs for pltf. Fld 3 exbs for deft.
6/29/54—Fld Deposns of Mary R. Martin & Robert W. Adams tkn 6/12/54.

10/ 1/54—On cts own mot ent ord trial date 10/26/54 is vacated & case is contd to 11/15/54, 10 a.m. for re-settg for trial. Counsel notif.

10/ 4/54—Fld deft's First Amd Ans & Not of Mot & Ord shortening time to 10/11/54.

10/11/54—Ent prcdgs & ord grtg dfts mot for lv to file amended answer.

11/15/54—Fld Deft's req for adms. Ent prcdgs & ord settg for trial 12/16/54, 2 p.m.

12/ 8/54—Fld Reptr's Transc of deposn of E. L. McKee tkn 7/22/54.

12/ 9/54—Fld Deposns of Fred L. Ritzmann, John C. Morgan, Harold T. Moss, Joseph S. Ross tkn 12/2/54 with exhibits pertaining thereto & not of tkg.

12/13/54—Fld Deposn of Alfred E. Dean, tkn 6/14/54. Fld. Deposn of Abraham Mechanic tkn 12/8/54 at 11:30 a.m.

12/14/54—Fld Depsn of MP. Pihl tkn 12/9/54 with Exhibit 1 to 7 incl.

12/16/54—Fld Pltf's reply to Deft's req for adms. Ent prcdgs ct trial. Sw 4 wits for plf. Fld 25 exbs for plf. Ent ord fur trial cont 12/17/54, 9:15 a.m. [94]

12/17/54—Ent prcdgs fur trial. Fld exbs for plf. Fld exbs for dft. Sw 3 wits for dft. Ent ord exbs may be withdrawn by counsel during period of briefing. Ent ord plf hv 30 days after receipt of last vol transc to file opening brief, deft hv 30 days to

answer, plf hv 15 days thereafter to file reply, whereupon matter will stand subm.

12/27/54—Fld Deft's Mot retble 1/10/55 to amend answer to conform to proof.

1/10/55—Ent prcdgs & ord denyg mot dft for lv to file amendmt & suppl to 1st amended answer.

1/12/55—Fld Rect of Albert J. Fihe for withdrawal of all Deft's & Pltf's Exhibits.

2/14/55—Fld Pltf's Brief.

3/11/55—Fld Deft's Brief. Fld Clk's copy of reporters transcript of prcdgs for 12/16/54 & 12/17/54 (2 vols).

3/23/55—Fld Plf's reply brief.

6/21/55—Ent ord, matter hvg been tkn under subm aft trial, jdgmt be ent in fv of deft & for defts costs. Atty for dft to prep findgs, & jdgmt pur Local R-7. Counsel ntfd.

8/ 9/55—Fld plfs memo suppt altern findgs etc. Lodged prop findgs and jmt.

8/15/55—Fld Deft's Memo Opposg Findings of Fact & Concls of Law Proposed by Pltf.

10/19/55—Fld finds fact & concls law & fld, dktd & ent judg dismiss plfs complt & fv deft for costs. Not attys. JS6.

10/24/55—Fld defts cost bill with affid of C. P. Von Herzen.

10/26/55—Not of ent of judg of 10/19/55 to Messrs Turrentine, Von Herzen et al, orig mld atty Turrentine remld to atty Von Herzen, same address.

10/31/55—Taxed costs fv deft in amt $639.44 on hrg, & ent same in judg. Fld memo by Clk re taxing. Fld plfs not of appeal & fld plfs stip for costs in amt of $250 surety bond. Mld cy of not of appeal to dfts attys Howard B. Turrentine, C. P. Von Herzen & S. L. Laidig, Rm 725, 453 So. Spring St., LA 13, Calif.

11/15/55—Fld plfs design for Record on Appeal.

11/21/55—Fld defts design of addnl ports of rec on app.

11/29/55—Fld plfs supplmtl Design of Rec on App.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 95, inclusive, contain the original

Complaint;

Motion & Notice of Motion to Dismiss, etc.;

Amendment to Complaint;

Motion & Notice of Motion to Dismiss, etc.;

Answer;

First Amended Answer;

Plaintiff's proposed Findings of Fact, etc.;

Plaintiff's Memo in Support of Suggested Alternate Findings, etc.;

Defendant's Memo opposing Findings of Fact, etc.;

Findings of Fact & Conclusions of Law;

Judgment;

Notice of Appeal;

Plaintiff's Designation for Record on Appeal;

Defendant's Designation of Additional Portions of Record;

Plaintiff's Supplemental Designation for Record;

Plaintiff's Motion to Extend time for completing & filing appeal; and a full, true and correct copy of the Minutes of the Court on December 31, 1953; March 1, 1954; June 15, 1954; Bond for Costs on Appeal; Docket Entries; Letter dated June 21, 1954 from Judge Tolin's Clerk; which, together with 2 volumes of reporter's transcript; Plaintiff's exhibits 1-38, 40-52, and 54-57; defendant's exhibits A-00, inclusive, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said Cause.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 13th day of December, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

In the United States District Court for the Southern District of California, Central Division

No. 14,783-T

NATIONAL VAN LINES, INC.,

Plaintiff,

vs.

ALFRED E. DEAN, trading under the firm name and style of National Transfer & Storage Co.,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, December 16, 1954

Honorable Ernest A. Tolin, Judge presiding.

Appearances: For the Plaintiff: Gerrit P. Groen, 38 Dearborn St., Chicago, Ill., and Albert J. Fihe, 1023 Victory Pl., Burbank, Calif. For the Defendant: C. P. Von Herzen, 453 S. Spring St., Los Angeles, Calif., and Collins Mason, 811 West 7th St., Los Angeles, Calif. [1*]

The Court: Call the case, please.

The Clerk: 14,783, National Van Lines, Inc., vs. Alfred E. Dean, trading under the firm name and style of National Transfer & Storage Co., for trial.

Mr. Mason: Ready for the defendant.

Mr. Fihe: Ready for plaintiff.

Your Honor, I suppose you remember Mr. Groen

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

of Chicago, who is here for the plaintiff, and he will try the case. He was here at the pretrial hearing, you will recollect.

The Court: I do recollect, but the moment I came to the bench I didn't. I wondered who was replacing Mr. Fihe.

Mr. Groen: We are together. [2]

* * * * *

I am ready to proceed with my first witness.

The Court: Do you want to make your statement?

Mr. Mason: I will withhold my statement until I open the defense, unless your Honor wants it now.

The Court: I don't care, whatever you prefer.

Mr. Groen: I will call Frank McKee. [14]

FRANK L. McKEE

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, please.

Your full name, sir?

The Witness: Frank L. McKee; M-c-K-e-e.

Direct Examination

By Mr. Groen:

Q. Will you please state your occupation, Mr. McKee?

A. President of the National Van Lines, Inc.

Q. How long have you served in that capacity?

A. Sixteen years.

Q. Were you with the company prior to serving

(Testimony of Frank L. McKee.)

in the capacity of president? A. Yes, sir.

Q. Were you with it from its inception?

A. No,—well, yes; shortly after.

Q. Was there a predecessor company to the present National Van Lines, Inc.?

A. Yes, sir.

Q. Who was that predecessor?

A. National Shippers and Movers.

Q. Was that a corporation?

A. Yes, sir.

Q. Did it start as a corporation? [15]

A. No, sir.

Q. Will you tell us the history of the organization of National Shippers and Movers and its subsequently being taken over by the National Van Lines, Inc.?

A. The business of National Shippers and Movers was started by F. J. McKee, my father, in 1928, the end of the year, and was later incorporated. I don't recall what date.

Subsequently it was changed to National Van Lines, Inc.; incorporated in June 1934. I believe that is the date.

Q. The name National was adopted and used back in 1928, you say is your best recollection?

A. Yes.

Q. As part of the firm name that was then unincorporated as National Shippers and Movers, is that right? A. Yes.

Q. And that name, either as a proprietorship

(Testimony of Frank L. McKee.)

or as a corporation, continued until 1934, when National Van Lines, Inc. was organized?

A. Yes, sir.

Q. Did National Van Lines, Inc. take over all the assets of National Shippers and Movers?

A. It did.

Q. Was National Shippers and Movers then dissolved or the charter surrendered?

A. Yes, sir. [16]

Q. Was that immediately or later on, speaking of the 1934 date? A. Immediately.

Q. When was the vertical stripe design first employed, which I am illustrating here, Exhibit 15, for the plaintiff?

A. The best of my recollection, about 1930.

Q. It was not used immediately when National Shippers and Movers was organized?

A. No, sir, not immediately.

Q. It was in the early '30's that the stripes were added to the word National? A. Yes, sir.

Q. Will you describe briefly the type of business this is?

A. The transportation of household goods interstate.

Q. Are you limited to that specific thing?

A. Yes, sir.

Q. Why?

A. The certificate is for the movement of household goods and commodities coming under that classification.

(Testimony of Frank L. McKee.)

Q. And you are limited because of Interstate Commerce Commission regulations, are you not?

A. Yes, sir.

Q. You can't haul freight?

A. No, sir. [17]

Q. Is that true of others in this business?

A. That is right.

Q. You have a franchise for one thing or the other? A. Yes, sir.

Q. And you also do storage business?

A. Yes, sir.

Q. Explain just what kind of moving this is. Is it for the general public or corporations or what?

A. It is for the general public and for corporations, which we call commercial accounts or national accounts, and for the Government, transferring the personnel of the armed forces.

Q. And still the same type of business, but one you contract directly with the private owner, and the other with the Government, for the moving of private parties? A. Yes.

Q. You also contract with corporations for moving employees? A. Yes, sir.

Q. Is there much—strike that.

Can you tell us approximately how much business goes into each one of these categories you have named? You have named three.

A. Yes. The national account is somewhere around five or eight per cent. And the Government business is about [18] thirty-five, and the balance is of the general public or C.O.D.

(Testimony of Frank L. McKee.)

Q. Can you tell us about the growth of your organization? Have you experienced a growth since 1934, when the present company was incorporated?

A. Yes, sir.

Q. To what extent? Did you cover the 48 States then or did that come about later?

A. In 1934 certificates had not as yet been issued by the Interstate Commerce Commission. We received our certificate in 1942.

In the meantime all movers continued transporting goods wherever their work would take them and under what rights they thought they were entitled to.

But when our certificate was issued, we received 30 States and the District of Columbia. And later we applied, under convenience and necessity application, for the balance of the States, some nine States, and were granted that authority in 1950.

Q. Is it correct to say then that today you do business in each of the 48 States?

A. Yes, sir.

Q. Is there any one State where the business is most heavily concentrated?

A. The greatest concentration of business is in the [19] State of California.

Q. Will you explain why that is in your case?

A. For years there has been a westward trend and the State of California has built up because of that westward trend. And we did our share in bringing the people to California.

Q. Is there any particular reason why you

(Testimony of Frank L. McKee.)

should stress the business you do, in-and-out business?

A. Yes, we do in-and-out business. We have worked hard to try to get a balanced traffic, so that our equipment would not have to go back empty or only partially loaded; back to the East from which they came.

Q. In other words, there is a natural flow west, or there has been? A. Yes.

Q. And because so many trucks come out loaded you have to work hard to get business going back, is that it? A. That is true.

Q. Referring again to Plaintiff's Exhibit 15, how long was that composite mark of National and the stripe design used in your business?

A. The present company?

Q. Well, the present company had it at its inception. A. Yes.

Q. Was it used prior to that, also? [20]

A. Yes, sir.

Q. And did you obtain registrations for that mark? A. We did.

The Clerk: Plaintiff's 3-A and 4-A for identification.

(The documents referred were marked Plaintiff's Exhibits 3-A and 4-A for identification.)

Mr. Groen: If the court please, I have handed the witness certified copies of the two registrations for the service marks in suit. They are exhibits attached to the Complaint. Previously soft copies were introduced in evidence as Exhibits 3 and 4.

(Testimony of Frank L. McKee.)

I have now given the witness the certified copies as 3-A and 4-A.

Q. By Mr. Groen: Now, Mr. McKee, referring to 3-A first, that is a true representation of the service mark as you are using it today?

A. Yes.

Q. And have used it for many years?

A. Yes, sir.

Q. Are you still the owner of that mark and the registration therefor? A. Yes, sir.

Mr. Mason: I object to that as calling for a conclusion.

The Court: Sustained.

Q. By Mr. Groen: Have you ever assigned this mark to anyone else? [21] A. No, sir.

The Court: I reverse that. I think anyone can testify as to ownership, can't they? To testify they are the owner of the property.

Of course, it is their testimony. We will have to come to the conclusion after we hear what the evidence is on the subject.

Mr. Groen: The evidence shows they were taken out in their names. He just testified they never assigned it to anyone else.

The Court: All right.

Q. By Mr. Groen: You license agents to use this mark? A. Yes, sir.

Q. Now, referring to Exhibit 4-A, that is Registration No. 563,950, was that taken out by your company? A. Yes, sir.

(Testimony of Frank L. McKee.)

Q. Have you ever assigned that to anyone else?

A. No, sir.

Q. So far as you know, you are still the owner?

A. Yes, sir.

Q. Does National use any other mark in its business, except that as shown in the registration, 3-A, that you have before you, or which is reproduced as Plaintiff's Exhibit 15, which I am showing you? A. No, sir. [22]

Q. Has that mark been used continuously, that is, National and the stripe design?

A. Yes, sir.

Q. From the time you started with this company in 1934? A. Yes, sir.

Q. And it was also used by the predecessor prior to that? A. Yes, sir.

Q. Will you explain how National Van Lines, Inc. operates, Mr. McKee, that is, you have direct business and you have agents. Will you just unfold that and develop it for the court, please?

A. We have company offices that develop their share of bookings and these agents, in excess of 200, also book shipments for National Van Lines, and——

Q. Where are these agents?

A. In various parts of the country.

Q. You say over 200? A. Yes.

Q. How many in the State of California, roughly? A. Forty-three.

Q. You are referring to a memorandum to refresh your memory there (indicating)?

(Testimony of Frank L. McKee.)

A. To the roster, yes. [23]

Q. How do you operate directly, as distinguished from the operations as to agents? When I say "you" I mean your company.

A. The agents in most cases are just local movers with no interstate rights, and they are not in competition with us; those that have no authority.

Those that have a few States, and there are some that have a few, operate on their own authorities and book for themselves.

Q. In other words, an agent solicits local business, is that right? A. Yes, sir.

Q. And then how does it get to National Van Lines, Inc., or how do you continue with the business as solicited by the agent?

A. He will book the order on our order for service form and register that order with the regional office under whose direction he comes.

Q. Then you also book work directly by your own firm, is that right?

A. Yes, our own office books work directly.

Q. Where do you maintain offices directly?

A. In New York, Washington, Dallas, Chicago, Los Angeles.

Q. How many trucks do you operate, or perhaps we [24] should distinguish trucks from the vans. Will you explain that, please?

A. There are some straight vans, but the majority are tractor-trailer units. There are some 266 complete units in the service of National Van Lines.

(Testimony of Frank L. McKee.)

Q. Do all those trucks or units bear the service mark National and stripe design? A. Yes.

Q. On the truck and the tractor, if they are separate units? A. Yes, sir.

Q. What material do your agents use that shows a connection between your firm and the agency?

A. All of the advertising material that we distribute to them for their direct mailing program or for their distribution among shippers is that of National Van Lines. And letterheads. Recently, a television film, and a radio disk. We supply the decals for the vans that they paint up to match the fleet in color and design.

And we assist them in the purchasing of packing materials with company emblems on that material.

Q. Do you have some of this material here you are going to produce?

A. We have a picture of some material, yes.

Q. Did you ever have an agency agreement with Alfred [25] Dean? A. Yes, sir.

Q. When was this agreement entered into, do you recall? A. In 1944.

Q. How long did it exist? A. Until 1950.

Q. Who canceled it? A. Mr. Dean.

Q. Do you remember the reasons for cancellation?

A. Well, Mr. Dean was disturbed at that time because—I believe because he wasn't getting settlement as fast as he could make use of the money.

Q. Well, explain that a little more fully. What do you mean?

(Testimony of Frank L. McKee.)

A. Usually we settle once a month, about the 10th of the succeeding month, time in which to get the accounts in order.

Mr. Dean was pretty well advanced in his work, having done a great deal of packing, and was in need of financial relief for the moneys he had paid out.

Q. It was largely a question of prompt remittances then?

A. Yes, I think that he must have had some promise of some other arrangement for that, to cover the financial need. [26]

Q. You know nothing about that personally?

A. No, I don't.

Q. Then don't testify about it. You paid him once a month and he wanted payment sooner than that, is that it? A. As I recall.

Q. I will show you a contract marked Plaintiff's Exhibit 5, and ask if that is the original contract between your firm and Dean, then known as National Transfer & Storage? A. Yes, sir.

Q. Does that have a notation on the front of it that it was canceled? A. Yes, sir.

Mr. Von Herzen: May I be permitted to approach the witness chair and examine the contract?

The Court: Surely. This has been in our file for six months. but come up again and see it if you wish.

Q. By Mr. Groen: You acknowledge that that contract was cancelled on February 20, 1950, then?

A. Yes, sir.

(Testimony of Frank L. McKee.)

Q. Are agents encouraged to use the name and stripe design mark when they operate for you?

A. Yes, sir.

Q. And Dean was encouraged the same way as any other agent in that respect? [27]

A. Yes, sir.

Q. Will you explain through what channels you advertise, Mr. McKee?

A. Practically every form of advertising, trade journals, newspaper, radio, television.

Q. Do you use directories?

A. Yes, telephone directories. Concert programs. Anything you can get your name on.

Q. Do you use the mark National and the vertical stripe design in your advertising throughout?

A. In everything.

Q. Now, I will bring up some of the pieces in a moment, but I would like to do that at one time.

Referring to defendant's activities since the cancellation of the agency agreement, do you know of any occasion of receiving telephone calls or mail that was intended for defendant, that you got or that defendant got some of yours, or your company's?

A. I can't recite any specific instance, but instances did come to my attention. They would be much better in the mind of the first person.

Q. Who would know specifically who they were?

A. Mr. Bock of Los Angeles. He would be one, or Bob Adams, manager of the San Francisco office, was another.

(Testimony of Frank L. McKee.)

Q. Do you personally know there were misdirected [28] telephone calls and letters, and the like? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. And they know about the details?

A. Yes, sir.

Mr. Groen: If the court please, I could save a little time by going through a number of exhibits, if I could stay right near the witness.

The Court: Surely.

Q. By Mr. Groen: Mr. McKee, I am going to show you several exhibits. This has already been admitted as No. 1 for plaintiff. Those are true representations of letterheads or parts of letterheads of both plaintiff and defendant? A. Yes.

Q. Here are groups of pages from the telephone directories of Los Angeles and San Francisco, that have been admitted previously as Exhibit 2 for plaintiff. Are you familiar with those?

A. Yes, sir.

Q. Does that show both plaintiff's and defendant's ads? A. Yes, sir.

Q. National and the stripe design?

A. Right. [29]

Q. Here are some pages, identified or admitted as Exhibit 6 previously, in the San Diego telephone directory. I will ask you if you are familiar with those. A. Yes, sir.

Q. They show both plaintiff's and defendant's ads with National and the stripe design?

A. Yes, sir.

(Testimony of Frank L. McKee.)

The Court: Where is the defendant's?

The Witness: Here is the defendant's (indicating).

The Court: Where is yours?

The Witness: 334 is theirs, and here is ours on page 333, right here (indicating).

Q. By Mr. Groen: I am handing you what purports to be a letterhead of plaintiff's, Exhibit 7-A. Is that a true letterhead you are using today, showing your composite mark? A. Yes, sir.

Q. I am handing you another letter——

A. Pardon me. One exception. We have made a change recently of letterheads.

Q. Did you change the mark on it?

A. No, not the mark; it is the style of it.

The Court: Style of what?

The Witness: Style of the letterhead. You have that sample copy, Mr. Groen. I don't have it.

The Court: Was the style of the mark changed?

The Witness: No, no.

Q. By Mr. Groen: Is this the one you are referring to (indicating)?

A. This is our latest letterhead.

The Court: You had better give that a number. Mr. Clerk, will you mark it, please?

The Clerk: 7-C.

(The document referred to was marked Plaintiff's Exhibit 7-C for identification.)

Mr. Groen: Did you see this, Mr. Von Herzen?

Mr. Von Herzen: No.

(Testimony of Frank L. McKee.)

Mr. Groen: It is 7-C, just marked for identification.

Q. By Mr. Groen: That is the letterhead you are currently using?

A. Yes, sir. It is also being used by the agents.

Q. Have you seen this letterhead of defendant, Exhibit 7-B, before? A. Yes, sir.

Q. You have seen that in the normal course of business in your correspondence with them?

A. Yes, sir.

Q. I am showing you a picture which has previously been admitted, I believe, as Plaintiff's Exhibit 8.

Will you explain to the court what that is, please?

A. This is a picture of one of the early units that [31] made trips to California from the East. It shows the emblem in connection with National Shippers and Movers.

Q. How old would you say that is?

A. This picture dates back to perhaps 1931, '30 or '31.

Q. Showing you another exhibit marked for identification as Plaintiff's Exhibit 9, is that a true copy of the Articles of Incorporation for National Van Lines, as it exists today?

A. Yes, sir; June '34, the date of incorporation.

Q. Here is a document previously marked for identification as Plaintiff's Exhibit 10. Explain what that is, please.

A. This is one of the early shipping orders dated

(Testimony of Frank L. McKee.)

October 3, 1932, under the name of National Shippers and Movers; a movement to Los Angeles.

The Court: I see that several of these exhibits are National Shippers and Movers.

Mr. Groen: The predecessor company.

The Court: You are not contending that to be a previously or to be a presently infringed mark, are you?

Mr. Groen: No. That has been abandoned. This present plaintiff has taken over all the assets, as Mr. McKee has testified to.

The Court: All right. This is just history? [32]

Mr. Groen: Yes. It is early use, however, of National and stripe design. That is what it is being offered for.

Q. By Mr. Groen: Look at this document marked Exhibit 11 for plaintiff, and tell us briefly what that is.

A. This is a shipping document for movement of household goods from Chicago to Los Angeles, under date of November 15, 1932.

Q. Look at this document marked Exhibit 12. Tell us what that is, please.

A. This is a freight bill dated November 24, 1937.

Q. National Van Lines, Inc.?

A. National Van Lines, Inc.

Q. Look at this document, No. 13, and explain what that is, please.

A. This is an invoice, or freight bill—pardon me. The previous one was a bill of lading. This is

(Testimony of Frank L. McKee.)

a freight bill dated November 25, 1937; National Van Lines, Inc.

Q. Handing you another document, Mr. McKee, marked Plaintiff's Exhibit 14, will you explain what that is?

A. This is a picture of a tractor-trailer unit. That shows the fleet color and design.

Q. As currently used, is it?

A. As currently used; showing the style of all equipment.

Q. Look at this document marked No. 15 and explain [33] what that is, please.

A. This is my own personal card.

Q. Showing the National and stripe design?

A. Showing the National Van Lines insignia in stripes, red and white stripes.

Q. Look at this document marked Plaintiff's Exhibit No. 16, which purports to be a collection of pages from telephone directories.

Will you run through those quickly, please, and tell us what they show?

A. This is a page from a Chicago directory showing our ad. That was the first one.

The second one is also a Chicago page, from a directory, telephone directory.

The third one is also a Chicago directory page, showing our ad.

The next is a New York ad of ours; New York directory ad.

Mr. Groen: These documents marked Exhibits

(Testimony of Frank L. McKee.)

1 through 16, inclusive, just referred to by the witness, are offered in evidence.

The Court: Received. Some of them have been received before.

Mr. Groen: Yes.

The Court: But I notice some of them are only marked [34] for identification, so we had better have them checked over, Mr. Clerk, and see they bear the "Received" stamp.

(The documents heretofore marked Plaintiff's Exhibits 3-A, 4-A, 6, 10, 11, 12, 13, 14, and 16 were received in evidence.)

Q. By Mr. Groen: Now, Mr. McKee, I am handing you a booklet marked, previously marked Plaintiff's Exhibit 17 for identification.

Shall we go through that quickly and identify the pages. What is the first unit?

A. The first page is a blotter.

Q. That is distributed in any quantities by your firm?

A. Yes, I think the last order was about 25,000.

Q. Your agents used that, also?

A. Yes.

Q. Look at the next unit and tell us what that is.

A. That is an estimate sheet that goes out to all offices and agents, that is used to secure business.

Q. That illustrates a picture of your van line, too? A. Yes.

Q. The next item is an envelope showing your trademark? A. Yes.

(Testimony of Frank L. McKee.)

Q. The next is a letterhead, the same as you identified before? [35]

A. Yes.

Q. Another photograph of one of your van lines, the next one? A. Yes, one of the units.

Q. Explain this document (indicating).

A. That is an advertising piece called, "15 Helpful Hints". It is distributed among the trade.

Q. You have a note here, "64,000 Distributed in 1954". A. That is right.

Q. Is that a typical quantity in which those are distributed?

A. Yes, but we had much more than that, but that amount was distributed in '53.

Q. Your agents used those?

A. Yes, sir.

Q. What is this document on this sheet?

A. A postal card. The distribution for that in '53 was 41,500.

Q. Look at this document. What is this?

A. This is another estimate sheet. It preceded the other; replaced by the other one.

Q. What is this booklet contained inside here?

A. That is a give-away item to the trade, and it is entitled "Pioneer's Progress".

Q. Does that bear your service mark? [36]

A. It does, and it also has a picture of a van in the center portion.

Q. Has that booklet been distributed rather widely? A. Yes, sir.

Q. Through your agents?

(Testimony of Frank L. McKee.)

A. To agents in offices. We are on the second issue of that book.

The Court: How many were printed on the first issue?

The Witness: The first, I think about 35,000.

The Court: Were they all distributed?

The Witness: Yes.

The Court: How many have been printed in the second issue ?

The Witness: I think an equal number. And we have about 30,000 on hand at the present time.

The Court: You have just started on the second issue?

The Witness: Yes.

Q. By Mr. Groen: What is this document I am referring to (indicating)?

A. That is a commercial or natoinal account item, and distribution of 20,000 in 1953.

Q. Here is a sheet with respect to advertising. Is that a typical tabulation of telephone directory advertising in the cities, and the quantity?

A. Yes. [37]

Q. Cities mentioned and the quantity you take?

A. Yes.

Q. Is that typical? A. Yes.

Q. That says Chicago and suburbs, Dallas, Washington, Los Angeles and suburban directories——

A. Yes, there are four Chicago directories. And that has been increased recently.

In New York there are four boroughs; I think

(Testimony of Frank L. McKee.)

we increased that just recently, including two more books.

And there is Dallas, Washington, Los Angeles—Los Angeles there are eight suburban directories.

San Francisco, Sacramento, Elizabeth, New Jersey; Patterson, New Jersey, and Hackensack.

Q. This next page is another typical sheet from a classified telephone directory? A. Yes.

Q. Showing your ad, is that right?

A. Yes; that is from a Chicago directory.

Q. Insofar as all these telephone directory and trade directory ads are concerned, your stripes are always shown in alternate black and white stripes, are they not? A. Yes, sir.

Q. Here are several pages of what appear to be magazines. Traffic World. [38]

A. Yes, sir.

Q. Sales Management, and the like.

A. Right.

Q. What are those in there for?

A. That shows the advertising done with those trade journals.

Q. Is that a typical trade journal advertising?

A. Yes. Here is Sales Management (indicating).

The Court: You have gotten over into another section, haven't you?

Mr. Groen: No; the same book.

The Court: What is the number?

Mr. Groen: 17.

The Witness: Business Week, and Transport Topics.

(Testimony of Frank L. McKee.)

Q. By Mr. Groen: Now, you have been referring to Exhibit 17, identifying each of these separate pieces? A. Yes, sir.

Q. That is all contained in this brown covered book? A. Yes.

Q. This is an illustration of typical advertising that you use? A. Yes, sir.

Q. In connection with telephone directories, do you have to order your space and give your advertisement far in advance? [39] A. Yes.

Q. How far in advance?

A. I think the last change you can make is 30 days before closing time, but you have to have your —I think you have to have your cuts in before that.

Q. How long do they stay out once you give them?

A. Those vary. There are a few books that go, still go for only six months, but many of them go for nine months and a year.

Mr. Groen: The court please, I have another series of additional ads that haven't—and material that haven't been marked, if I may take a moment.

The Court: All right. Have the clerk mark them.

The Clerk: Plaintiff's 18.

(The documents referred to were marked Plaintiff's Exhibit 18 for identification.)

Mr. Groen: Exhibit 18 is a collection of pages from the classified Los Angeles telephone directory.

The Clerk: 19.

(Testimony of Frank L. McKee.)

(The document referred to was marked Plaintiff's Exhibit 19 for identification.)

Mr. Groen: Exhibit 19 is a sheet of statistics on advertising.

The Clerk: 20.

(The document referred to was marked Plaintiff's Exhibit 20 for identification.) [40]

Mr. Groen: Exhibit 20 is a currently-used pamphlet of National Van Lines advertising.

Mr. Mason: The telephone directory, is there anything on there to denote the year?

Mr. Groen: This last one is marked——

The Clerk: 21.

(The document referred to was marked Plaintiff's Exhibit 21 for identification.)

Mr. Groen: ——Exhibit 21. It is another pamphlet.

The Clerk: 22.

(The document referred to was marked Plaintiff's Exhibit 22 for identification.)

Mr. Groen: Exhibit 22 purports to be a further pamphlet used by plaintiff.

The Clerk: 23.

(The document referred to was marked Plaintiff's Exhibit 23 for identification.)

Mr. Groen: Exhibit 23 is an advertising piece showing how National Van Lines advertises at entertainments.

The Clerk: 24.

(The document referred to was marked Plaintiff's Exhibit 24 for identification.)

(Testimony of Frank L. McKee.)

Mr. Groen: Exhibit 24 is another advertising piece showing means of publicity for National Van Lines.

The Clerk: 25. [41]

(The document referred to was marked Plaintiff's Exhibit 25 for identification.)

Mr. Groen: Exhibit 25 is a circular of the Fruehauf Trailer Company, showing a series of moving vans and how they use our trade-marks.

The Clerk: 26.

(The proof referred to was marked Plaintiff's Exhibit 26 for identification.)

Mr. Groen: Exhibit 26 is a proof of a mat distributed by National Van Lines to its agents.

The Clerk: 27.

(The proof referred to was marked Plaintiff's Exhibit 27 for identification.)

Mr. Groen: Exhibit 27 appears to be another proof of a mat distributed by National Van Lines currently.

The Clerk: 28.

(The calendar referred to was marked Plaintiff's Exhibit 28 for identification.)

Mr. Groen: Exhibit 28 is a calendar used by National Van Lines.

The Clerk: 29.

(The photograph referred to was marked Plaintiff's Exhibit 29 for identification.)

Mr. Groen: Exhibit 29 is a photograph.

The Clerk: 30. [42]

(Testimony of Frank L. McKee.)

(The photograph referred to was marked Plaintiff's Exhibit 30 for identification.)

Mr. Groen: Exhibit 30 is——

The Witness: Mr. Groen, does that have to go in? That is the original.

Mr. Groen: Exhibit 30 is a photograph showing packaging material used by National Van Lines.

The Clerk: 31.

(The document referred to was marked Plaintiff's Exhibit 31 for identification.)

Mr. Groen: Exhibit 31 is Certificate of Public Convenience and Necessity, issued by the Interstate Commerce Commission.

The Clerk: 32.

(The document referred to was marked Plaintiff's Exhibit 32 for identification.)

Mr. Groen: Exhibit 32 is a tabulation of National Van Lines tonnage, state for state.

The Clerk: 33.

(The document referred to was marked Plaintiff's Exhibit 33 for identification.)

Mr. Groen: Exhibit 33 is a document showing state by state and the number in each.

The Clerk: 34.

(The document referred to was marked Plaintiff's Exhibit 34 for identification. [43]

Mr. Groen: Exhibit 34 is a tabulation of advertising expenses, 1944 through 1955.

The Clerk: 35.

(The document referred to was marked Plaintiff's Exhibit 35 for identification.)

(Testimony of Frank L. McKee.)

Mr. Groen: Exhibit 35 is a tabulation of gross business for the years 1939 through 1954.

Q. By Mr. Groen: Now, Mr. McKee, will you run through those quickly and just tell us what that is (indicating)? I am handing you 18.

A. This is a section of the classified directory of Los Angeles for the issue August 1954.

Q. Will you show it to the court, please, and point out your ad and that of the defendant?

A. (Witness complies.) This is defendant's ad, and this is our ad, on page 1058 (indicating).

Q. Look at this document, No. 19, and tell us what that is, please.

A. This is a recap of the circulation, magazines and newspaper.

Q. Does that show current advertising expenditures?

A. It is for space advertisements in 1953.

The Court: Space advertisements of what and by whom?

The Witness: Advertising Age, Business Week, Sales Management,—— [44]

The Court: I can read that. But what is advertised? What is the material that is advertised?

The Witness: What we showed in this section here (indicating).

Mr. Groen: You are referring to Exhibit 17, the last pages in that?

The Witness: Yes, sir, Sales Management; this is the ad. And this is Traffic World; this is the ad (indicating).

(Testimony of Frank L. McKee.)

The Court: Then this other exhibit that you were referring to here, Exhibit 19, is a record showing the issues in which these advertisements appeared?

The Witness: Yes.

The Court: And reported circulation?

The Witness: Right.

The Court: Of the particular publications?

The Witness: Yes, sir.

The Court: All right.

Q. By Mr. Groen: Now, look at this pamphlet marked Exhibit 20, and tell us what that is, please.

A. This is an advertising piece that is distributed among the trade and is to assist the shipper in preplanning a move.

The Court: What is the number of that?

Mr. Groen: Exhibit 20.

The Court: We will take a short recess.

(Short recess taken.) [45]

The Court: My secretary had sent me a note there was a party that had a matter of great urgency. I found it was a very brief matter. They just wanted to pay their respects. I am anxious not to take a long recess today because we have the adjournment at 4:00, and it is my understanding that you had desired to finish this case this week.

Mr. Groen: We do, and we are going to cooperate.

The Court: We will run through until 4:00, and tomorrow I will start as early as you feel you can be ready.

(Testimony of Frank L. McKee.)

Mr. Groen: Any time your Honor says.

The Court: 9:00 o'clock, is that too early?

Mr. Mason: 9:15; I can make it.

The Court: 9:15 tomorrow.

Q. By Mr. Groen: Look at this document, Exhibit No. 21, Mr. McKee. A. Yes, sir.

Q. What is that?

A. It is an advertising piece that is distributed among the trade, all types.

Q. Does that show your composite mark?

A. It does.

Q. It is not in red, white, and blue?

A. No, sir.

Q. It is blue and white and black?

A. Yes, sir. [46]

Q. Look at this piece marked Exhibit 22, and will you tell the court what that is, please?

A. This is an advertising piece that goes out to prospective agents.

Q. Is that circulated widely?

A. Yes, sir.

Q. Look at this exhibit marked 23. Will you tell us what that is?

A. This is a program in which our agent Cherry Transfer has our emblem as an advertisement on one of the pages.

Q. Look at this document marked Exhibit 24, and will you tell the court what that is, please?

A. This is the result of publicity that we received on television twice this past year. Both

(Testimony of Frank L. McKee.)

times the broadcast was to some forty million people and——

Q. What program was that?

A. "This Is Your Life," Ralph Edwards' show.

The Court: How did this piece of literature, Exhibit 24, figure in the broadcast?

The Witness: We developed that later, to continue with the advertising that we received from the original medium.

The Court: And this Exhibit 24 then was circulated some?

The Witness: Yes; that is a mailing piece and it is also given out by hand to the trade. [47]

Q. By Mr. Groen: Look at Exhibit 25 and tell the court what that shows.

A. This is an advertisement made up by Fruehauf Trailers and shows seven units of various national lines, including the unit, picture of the units of National Van Lines, Inc.; fourth one down.

Q. Look at this document, Exhibit 26, and explain what that is, please.

A. This is a copy of a mat used in newspaper advertising and it is distributed among the agents.

Q. Look at Exhibit 27 and explain that, please.

A. This is a sample of what the setup should be for agents using the cuts in the center of the sample.

Q. Look at Exhibit 28 and explain that, please.

A. This is for telephone directory, that Exhibit 27. This is another advertisement, advertising piece,

(Testimony of Frank L. McKee.)

a calendar for 1955, and it is just being distributed. I think there are 50,000 of those.

Q. What is this photograph marked Exhibit 29, please?

A. This is another publicty for National, in which case our van was used by a television broadcasting show, "Truth or Consequences", and the units went across the country, from Los Angeles to New York, and stopped at some thirty cities en route, and in each instance the public marched through the van. [48]

The Court: Did you have the trade-mark inside the van?

The Witness: I think the operators on the truck had their uniforms with trade-marks.

Q. By Mr. Groen: Looking at that photograph, Exhibit No. 30, explain to the court what that contains.

A. This is a display of packing materials of National Van Lines, on which the trade-mark is shown in each instance.

Q. What type of units do you find there exhibited in that photograph?

A. There is a barrel and mattress cartons and lamp shade cartons, a wardrobe carton, a pad thrown over the top of one of the cartons. That doesn't have the emblem, but has the name, and the employee has the emblems on his uniform.

Q. Is that typical of how you use your mark National and the stripe design?

A. Yes, sir.

(Testimony of Frank L. McKee.)

Q. Look at this document marked Exhibit 31, and tell us briefly what that is.

A. This is a copy of our Certificate of Public Convenience and Necessity from the Interstate Commerce Commission, the last one issued.

Q. Look at this Exhibit 32, please. Will you explain what that represents?

A. That represents tonnage per State outbound and inbound for the year 1953. [49]

Q. That is a typical year's work, is it?

A. Yes.

Q. What do you mean by inbound and outbound?

A. Shows the amount of tonnage that goes into a State and how much tonnage is transferred from the State.

The Court: You mean by use of your equipment that bears the trade-mark?

The Witness: Yes, sir, by the equipment of National Van Lines, Inc.

Q. By Mr. Groen: That shows California from five to six million in and out, is that right, roughly?

A. Yes.

Q. That is by far larger than any of the others on there? A. Yes, sir.

Q. The next highest is New York or Texas?

A. The next highest would be——

Q. Illinois?

A. I believe Illinois.

Q. Illinois, Texas, New York, and the largest is California, is that right?

(Testimony of Frank L. McKee.)

A. Right.

Q. Look at this document, Exhibit 33, and explain that, please.

A. This shows the number of agents per State, and [50] there is one State missing, the State of Minnesota, in which there are 11 agents.

Q. Look at this document, Exhibit No. 34, and explain what that is, please.

A. This shows the advertising cost per year, starting with the year 1944, up to and including an estimated figure for the year 1955. But that does not include the advertising done by the agents.

Q. Have you any idea what percentage of advertising is done by the agents that involves your mark, in addition to your own, compared to your own? A. No, I wouldn't know that figure.

Q. Is it substantial or trivial compared to your own?

A. It is substantial. They all have a display ad in the directory in almost every instance, and we have distributed television reels among the agents for their use at various stations.

Q. Look at this document marked Exhibit 35, and will you tell the court what that shows, please?

A. This shows the annual line haul business starting with the year 1939, with an estimated figure, on through to 1954, with an estimated figure, showing for that year.

Q. What is the 1954 business?

A. Pardon?

(Testimony of Frank L. McKee.)

Q. Your 1954 business estimated at three and a half [51] million gross?

A. Three and a half million, yes.

The Clerk: Plaintiff's 36 and 36-A.

(The drawings referred to were marked Plaintiff's Exhibits 36 and 36-A for identification.)

Mr. Groen: Plaintiff's 36 and 36-A are drawings used as a basis for television reels.

Q. By Mr. Groen: These cardboard displays just marked 36 and 36-A, Mr. McKee, will you explain to the court what they are and how they are used?

A. These are the worksheets for the film that was developed, the cartoon. It starts out with a van approaching, and from which——

The Court: These didn't reach the public, did they?

The Witness: Yes, these already are on TV.

The Court: In this form?

The Witness: In this—well, it is in motion pictures. It is a motion picture film, but we couldn't shoot the film here today. We could have, if it were permitted.

Mr. Groen: We are trying to save time. The motion picture film was taken from this.

The Court: Many litigants do show films here. It awards us kind of a break from the monotony of simply hearing witnesses.

The Witness: We could have one in here by Monday. [52]

(Testimony of Frank L. McKee.)

The Court: Go ahead. I just didn't understand what you were doing.

The Witness: It is a ditty to the tune of Oh, Susanna that goes right on through. This figure jumps up on the top of the van and sings the number.

Q. By Mr. Groen: Well now, the point of this is that it shows your mark National and the stripe design in various places throughout?

A. Yes, all throughout.

Q. These drawings are the basis for your television film, is that right? A. Yes.

Q. What happens to those television films?

A. They are distributed among the agents.

Q. Used throughout the country?

A. Yes, sir.

Q. How many such reels of these films have you in circulation now?

A. I don't know how many in circulation. Our first order has been a hundred.

Q. Have you shown these in television already?

A. At our branch in Dallas there has been one that has been doing now for, oh about a month, I guess.

Q. This is typical material then of your television work? [53] A. Yes, sir.

Mr. Groen: The exhibits just identified by the witness, Exhibits 18 through 36-A, are offered in evidence. And I would like to make the statement that we haven't established any dates and they were not offered to specify any particular dates, either;

(Testimony of Frank L. McKee.)

just a cross section of advertising and other material, except such dates as already appear on them.

The Court: Some of them show dates on their face.

Mr. Groen: Yes.

The Court: They are received.

Mr. Mason: No objection.

(The exhibits heretofore marked Plaintiff's Exhibits 18 to 36-A, inclusive, were received in evidence.)

Mr. Groen: Mr. Mason made the point I hadn't established any dates. I didn't think it was important. Unless they show a date I didn't want to take the witness' time to try to recall.

The Court: Take whatever time is necessary to establish your case. If necessary, we will spend some time on it next week, although I got the impression you didn't want to be here that long and I had planned to start my vacation next week.

Mr. Groen: I had planned to start mine Saturday, also. Mr. Mason has agreed to cooperate. I think we can finish tomorrow. [54]

Then may I ask also whether we may submit photostats of this 36 and 36-A, since Mr. McKee has to return these to the studio.

The Court: Yes.

Mr. Groen: And file those. Is that agreeable, also, Mr. Mason?

Mr. Mason: Yes.

Q. By Mr. Groen: Mr. McKee, have any at-

(Testimony of Frank L. McKee.)

tempts been made at settlement of this proceeding?

Mr. Mason: I object to this as being improper, irrelevant.

The Court: Sustained. Sometimes a desirable route to pursue, but it is not an admissible item of evidence.

Mr. Groen: I just thought of showing—it isn't too relevant—as a possible measure of aggravating any damages that might be forthcoming, if we prevail. For that reason I was going to show what we tried to do by way of settlement.

The Court: I don't think it is legally admissible.

Q. By Mr. Groen: Mr. McKee, you have already incurred certain expenses in connection with the conduct of this trial and you were given an estimate, were you, as to what the total expense would be through the District Court?

A. Yes, sir.

Q. How much is that total estimate? [55]

Mr. Mason: I object to that as immaterial.

The Court: It is not immaterial, but it is premature; at least, it is under the way these cases ordinarily are handled in this District, counsel.

Now, if it is important to you, perhaps we can make an exception here. Usually the question of liability is determined in the main lawsuit, and if attorney fees are awarded, the judges of this District then indicate that attorney fees are awarded and that there shall be a supplemental hearing on a motion calendar on a Monday morning to determine what they will be.

(Testimony of Frank L. McKee.)

Mr. Groen: I only raise the question because I believe that to be the law, except a year or two ago I ran into the same situation in New York, and the Second Circuit Court of Appeals said I missed my chances in not putting in the evidence at the initial trial.

The Court: You don't have to put it in on the main trial.

Mr. Groen: If I can rely on that, I will be perfectly happy to withdraw my question.

The Court: If you have special damages you had better put them in, though, other than attorneys fees. I do not mean an accounting of the profits.

In many of these trade-mark cases if judgment goes for the plaintiff, the defendant is required to hand over the [56] profits that he had made by reason of infringing the trademark. That calls for an accounting. And we just don't undertake to have those accountings until and unless liability is determined.

But if there are damages other than attorney fees, an accounting of profits——

Mr. Groen: If I am not bound by the case of Admiral vs. Penco, at 203 Fed. (2d) 515, in the Second Circuit Court of Appeals, which held to the contrary, I would be very happy to hold this in abeyance.

The Court: You are in the Ninth Circuit now, and they have approved the way in which we do it. At least, they have not disapproved it, to my knowledge.

(Testimony of Frank L. McKee.)

Mr. Groen: We will have that understanding, that this may be proved later, if necessary.

The Court: Thank you.

Mr. Groen: That is all of the direct. I have a request of the court and my opponent.

We have three very short witnesses I think we can finish with before 4:00 o'clock, so we wouldn't have to call them back tomorrow.

Could we put them on and hold Mr. McKee's cross examination for tomorrow? I think that would help us a great deal.

The Court: Is that agreeable, Mr. Mason?

Mr. Mason: That is agreeable to the defense.

The Court: All right. Mr. McKee, we will have you step aside and hear the witnesses.

(Witness withdrawn.)

Mr. Fihe: Mr. Minear, will you please take the stand?

RUSSELL C. MINEAR

called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated.

State your full name, please.

The Witness: Russell C. Minear.

Direct Examination

By Mr. Fihe:

Q. What is your occupation, Mr. Minear?

A. I am West Coast manager of North American Van Lines.

(Testimony of Russell C. Minear.)

Q. How long have you been associated with that company? A. Seven and a half years.

Q. And your business address?

A. 4760 Valley Boulevard, Los Angeles.

Q. Do you know Mr. Frank McKee, the plaintiff here? A. Yes, I do.

Q. Under what business name does he operate?

A. National Van Lines, Inc.

Q. Are you familiar with the manner in which he displays his service mark in connection with his business? [58] A. Yes.

Q. I show you an enlargement of Plaintiff's Exhibit 15 and will ask you if you recognize that.

A. Yes, I do.

Q. What is it?

A. It is their trade-mark.

Q. Of whom? A. National Van Lines.

Q. When was the first time that you became acquainted with this trade-mark of the National Van Lines? A. Oh, approximately 1937.

Q. In what places have you seen it since?

A. Oh, I first knew of it in Des Moines, Iowa, and I have seen their trucks in places like Omaha, Kansas City, Minneapolis, Chicago; Fort Wayne, Indiana; Los Angeles here.

Q. I now show you an enlargement of plaintiff's Exhibit 4, and ask you to state if you have ever seen anything like that before.

A. Yes.

Q. Where was the first time you remember seeing this particular insignia?

(Testimony of Russell C. Minear.)

A. San Diego, California.

Q. On what? A. On a building.

Q. What was your reaction when you saw that?

A. I thought it was National Van Lines.

Q. You mean Mr. McKee's trade-mark?

A. Yes.

Q. Did you do anything after seeing that?

A. The next time I saw Mr. McKee I mentioned that he had quite a place in San Diego along the highway.

Q. What did he say?

A. He said, "That is not mine. It belongs to my competitor."

Mr. Groen: For the purpose of the record this insignia which the witness has identified is an enlargement of Plaintiff's Exhibit 4.

You may cross-examine.

Cross Examination

By Mr. Mason:

Q. Mr. Minear, what was there about that sign that made you think it was the National Van Lines?

A. The appearance of it, the way it looked, and the name. I saw it as I passed on the highway.

Q. You mean the name National Van Lines? Did you see the name National Van Lines on the sign?

A. No. The appearance of the insignia or the shield is what attracted my attention.

Q. Did you read the name?

A. I couldn't say I read the name, no. [60]

(Testimony of Russell C. Minear.)

Q. And did you observe that that was a map of the United States?

A. I don't recall that I noticed a map on it.

Q. Did you ever see a map on the National Van Lines shield? A. No, I never have.

Mr. Fihe: May I have the reporter read back the previous answer? Not this one, the previous one.

(The record was read.)

Mr. Fihe: Thank you.

Q. By Mr. Mason: Are you familiar with the shield that is used on all the Union Pacific freight cars?

Mr. Fihe: I object. That is improper cross examination. There was nothing said about that.

The Court: What makes it proper, Mr. Mason?

Mr. Mason: I want to show his comparison here, your Honor. It is preliminary.

The Court: All right. On the basis that it is preliminary, you may inquire. Overruled.

The Witness: I know they have a shield, but I don't believe I could describe it.

Q. By Mr. Mason: You spend a great deal of time in Los Angeles? A. Do I?

Q. Yes. [61]

A. Oh, I would say the past summer 75 per cent of my time.

Q. Have you ever observed the vans of the All-American Storage Company here?

Mr. Fihe: I object, your Honor. There again it is improper cross examination.

The Court: I take it that Mr. Mason is leading

(Testimony of Russell C. Minear.)

up to a showing that that shield is in the public domain.

Mr. Fihe: Yes, but let him prove it.

Mr. Mason: I am going to ask this witness the basis for his comparison here. I think these questions are very pertinent.

The Court: Actually, that comment, "let him prove it," is appropriate, because this is not strictly cross examination, except that there are some things which have been almost categorically stated by the witness, and others he is a little uncertain about. And I am not just certain what he did see or what he thinks he saw.

I think Mr. Mason is testing the memory of the witness. You can test a memory a little bit, but please don't try to prove your case through him.

Mr. Mason: I am going to prove that other business, your Honor. I want to test this witness' memory, just what he had in mind when he made that comparison.

I will withdraw that question. [62]

Q. By Mr. Mason: Have you, Mr. Minear, seen other van lines around Los Angeles displaying shields on their vans?

A. I can't say I have ever noticed it.

Q. You can't say that you have or that you haven't?

A. I don't recall of ever seeing a shield on another van line—on another van.

Q. Did you see the word "National" on that sign you saw in San Diego?

(Testimony of Russell C. Minear.)

A. Yes; I would say I did, yes. I wouldn't—I would hate to have to state that definitely. I am familiar with National Van Lines, and I noticed the shield and I considered that was National Van Lines.

The Court: You saw something which you thought was a National Van Lines sign?

The Witness: Yes, that is right.

Q. By Mr. Mason: Mr. Minear, how do you spell your name? A. M-i-n-e-a-r.

Q. Are you related to the Mr. Minear who used to be an associate of Mr. Fihe here?

A. No. I am orginally from Iowa. No relation that I know of, of the same name.

Q. How far away from this sign were you when you saw it? [63]

A. I was traveling on Highway 101; first time I had ever been in San Diego.

Q. How far was the sign from your place of observation?

A. I would have to estimate at 150 feet. That is strictly an estimate.

Q. Was it daytime or nighttime?

A. Daytime.

Q. Did you read the full name? A. No.

Q. Well, what sticks out in your mind as having impressed you that that was the National Van Lines? A. The shield.

Q. Just the shield alone?

A. Yes, that is what I took it to be.

(Testimony of Russell C. Minear.)

Q. You paid no attention to the word "National"?

A. I wouldn't say that I did. I am familiar enough with National Van Lines I figured it was their building, their installation.

Q. And if you saw a shield any place, would you think that was the National Van Lines?

A. It would depend on where it was located.

Q. Well, if it was on a truck?

A. Yes, I would assume it was, unless I definitely noticed the name. [64]

Mr. Mason: That is all.

Mr. Fihe: One more question.

Redirect Examination

By Mr. Fihe:

Q. What kind of a truck, if you saw a shield on a certain kind of truck?

A. On a warehouseman van, on a drop frame.

Q. Any other kind of truck? A. No.

Mr. Fihe: That is all.

Recross Examination

By Mr. Mason:

Q. Mr. Minear, did you ever give any business to the National Transfer & Storage Company?

Mr. Fihe: I object to that; improper cross examination, your Honor.

The Court: Overruled.

The Witness: I don't recall of giving them any business, sir.

(Testimony of Russell C. Minear.)

Q. By Mr. Mason: Isn't it true that you attempted to and that they turned you down?

A. I don't recall doing it; really, I don't.

Q. You are familiar with the National Transfer & Storage Company as it used to be, and now the Dean Transfer and Storage Company? [65]

A. Yes. I am familiar with what I have known of them in the past, oh, 20 months, 21 months.

Q. When was it that you saw this sign that you testified about?

A. In December 1952. I was out here on vacation.

Mr. Mason: That is all.

Mr. Fihe: Thank you, Mr. Minear.

(Witness excused.)

Mr. Fihe: Mr. Healey, will you take the stand, please?

GEORGE W. HEALEY

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated.

Your full name, sir?

The Witness: George W. Healey.

Direct Examination

By Mr. Fihe:

Q. What is your business, Mr. Healey?

A. I am in the moving and storage business.

Q. The business address, please?

(Testimony of George W. Healey.)

A. 1836 Arapahoe Street, Los Angeles 36, California.

Q. How long have you been in that business?

A. At this location 11 years.

Q. What is the name of the business?

A. Fidelity Van and Storage Company. [66]

Q. What was your occupation before that time?

A. I was in the long distance moving business.

Q. Operating from where?

A. Chicago and other points, over a period of years.

Q. Do you know Mr. Frank McKee, the plaintiff here? A. Yes, I do.

Q. How long have you known him?

A. At least 16 or 17 years.

Q. Do you know the insignia or service mark that he employs in connection with his business?

A. Yes, I am quite familiar with it.

Q. I show you an enlargement of Plaintiff's Exhibit 15 and ask you to state if you recognize that? A. Yes, I do.

Q. How long have you known of Mr. McKee or his company's use of this insignia or service mark?

A. I think even before I knew Mr. McKee; knew his father.

Q. You knew his father? A. Yes.

Q. Where have you seen this service mark?

A. Oh, in all points. I should say at least forty States in the United States.

Q. Over what period of time?

A. Over a period of 20 years. [67]

(Testimony of George W. Healey.)

Q. And on what items of merchandise or other things? A. On moving van equipment.

Q. I show you an enlargement of Plaintiff's Exhibit 4 and ask you to state, have you ever seen that insignia before? A. Yes, I have.

Q. Do you remember the first time you saw it?

A. Yes, I do; approximately a year ago.

Q. Where? A. At my warehouse.

Q. In? A. Los Angeles.

Q. On what sort of thing was it when you saw it? A. It was on a moving van.

Q. What was your reaction when you saw it?

A. Well, I went to examine it rather closely, because of the similarity between what I knew to be the National Van Lines insignia.

Q. And what did you do, if anything?

A. I did nothing. I just checked it. Thereafter I looked twice when I saw it.

Q. What did you find——

The Court: Did it occur to you to be a National Van Lines sign?

The Witness: I thought it was at first. [68]

The Court: Then you examined it closely, and did you still think so?

The Witness: No, the name Dean Van Lines was on it.

Mr. Fihe: You may cross examine.

Mr. Mason: No cross examination.

Mr. Fihe: Thank you very much, Mr. Healey.

The Court: Thank you, sir.

(Witness excused.)

Mr. Fihe: We have one more witness, your Honor. He might take a little longer, but we can start.

The Court: All right, let's start. I had commenced to think you would really get through by 4:00 o'clock.

WALTER BOCK

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your full name, sir?

The Witness: Walter Bock.

Direct Examination

By Mr. Fihe:

Q. Your name was mentioned once before here in the testimony, was it not, Mr. Bock?

A. I believe so.

Q. What is your business, Mr. Bock?

A. Regional manager for National Van Lines at Los [69] Angeles.

Q. How long has that been your occupation?

A. As manager for the past four years.

Q. What was your occupation before that?

A. Salesman for National Van Lines, for approximately four years.

Q. What did you do before that?

A. I was in with my folks in the moving business; they had been in it about 70 years.

Q. And where was this? A. In New York.

(Testimony of Walter Bock.)

Q. You are employed by National Van Lines, Inc., Mr. Frank McKee? A. That is right.

Mr. Fihe: May I have the clerk mark a carbon copy of a letter for identification as Plaintiff's Exhibit 37, and a photostat copy of a request for a bid as Plaintiff's Exhibit for identification No. 38?

(The documents referred to were marked Plaintiff's Exhibits 37 and 38 for identification.)

Q. By Mr. Fihe: I show you now the carbon copy of a letter marked for identification as Plaintiff's Exhibit 37, and I will ask you if you recognize that. A. That is right.

Q. Whose signature appears at the bottom of that letter? [70] A. That is mine.

Q. I now show you the photostat copy which is Plaintiff's Exhibit 38, and ask you to state if you recognize that? A. I do.

Q. How about the original of that, when did you receive that, if you can recollect?

A. The stamp here I have, June 18, 1954.

Q. What did you do with that original when you received it?

A. Being it was Government property I mailed it to Fort MacArthur, with a letter advising them that:

"Returned herewith is a crating bid contract addressed to National Transfer & Storage Co., 124 N. Center Street, Los Angeles, Calif.

"As you will note, 124 N. Center Street was our

(Testimony of Walter Bock.)

previous location, prior to the removal of our offices to our present address in 1953.

"No doubt this bid was meant for National Transfer & Storage Co., as National Van Lines, Inc. has never applied for any crating contract."

Mr. Von Herzen: What is that last?

Mr. Fihe: It is in the letter——

The Witness: "No doubt this bid was meant for [71] National Transfer & Storage Co., as National Van Lines, Inc. has never applied for any crating contract."

Mr. Fihe: Crating, c-r-a-t-i-n-g.

Mr. Von Herzen: Oh.

Mr. Fihe: I offer the same in evidence as Plaintiff's Exhibits 37 and 38.

The Court: I will look at them. Generally speaking, I don't look at things for identification, because sometimes they don't get in evidence. Sometimes it is necessary to rule upon their admissibility.

Exhibits 37 and 38 will be received in evidence and they will be marked accordingly.

(The documents heretofore marked Plaintiff's Exhibits 37 and 38 were received in evidence.)

Mr. Fihe: Will you stipulate that the photostat copy be used as the original, Mr. Mason?

Mr. Mason: Yes.

Mr. Fihe: Mr. Clerk, will you please mark this document which is a photostat of a check, as Plaintiff's Exhibit 39 for identification?

The Clerk: 39.

(Testimony of Walter Bock.)

(The check referred to was marked Plaintiff's Exhibit 39 for identification.)

Q. By Mr. Fihe: I show you Plaintiff's Exhibit 39 [72] for identification, and will ask you to state if you recognize that. A. I do.

Q. Tell the court the circumstances connected with that document, Mr. Bock.

A. This check of $25.00, issued by Dean Van Lines, also known as National Transfer & Storage, was made out to National Van Lines, and on the bottom it says, "To apply prepayment on insurance premium at $5.00."

The check is in the amount of $25.00. And to be credited to Lieutenant Fred T. Anderson, from San Diego, to St. Petersburg, Florida. Bill of Lading No. 84802.

Q. Where is the original of that check?

A. Now, the original of that check was mailed by the shipper to National Transfer & Storage Co. The Government does not pay for extra insurance when their personnel is moved, and thereby they must pay the insurance premium at the time of pickup.

Now, instead of them mailing $25.00 to National Van Lines——

Q. Whom do you mean by "them"?

A. The shipper, Lieutenant Anderson.

Q. Yes.

A. They mailed it to National Transfer & Storage and National Transfer & Storage deposited it to their own [73] account, the check, and then made

(Testimony of Walter Bock.)

out this check here to National Van Lines, to pay for the check they had received that originally didn't belong to them.

Q. Who received the original check from National Transfer & Storage?

A. National Transfer & Storage received the original check.

Q. The original check from National Transfer & Storage——

A. They received the original.

Q. I mean the original of that photostat.

A. We did in our L.A. office.

Q. Who opened the envelope? A. I did.

Q. And you recognize that as the photostat?

A. That is right.

Q. Who made the photostat?

A. I had the photostat made.

Mr. Fihe: I offer the same in evidence as Plaintiff's Exhibit 39, the photostat.

The Court: Where did you get that explanation of the transaction?

The Witness: Well, sir,——

The Court: Did you receive a letter in which——

The Witness: No, we didn't receive any letter on it [74] at all. We checked this bill of lading number, and the insurance was issued to the shipper, but the money hadn't been paid. They were supposed to send it in to us.

The Court: The exhibit is received into evidence.

(The check heretofore marked Plaintiff's Exhibit 39 was received in evidence.)

(Testimony of Walter Bock.)

The Court: It has come to the time of day where we will have to take the adjournment. Is 9:15 an agreeable time all around?

Mr. Fihe: Yes.

Mr. Mason: Yes.

Mr. Groen: Delighted.

The Court: All right. We will stand adjourned until 9:15 tomorrow morning.

(Whereupon, at 4:00 o'clock p.m., Thursday, December 16, 1954, an adjournment was taken until Friday, December 17, 1954, at 9:15 o'clock a.m.) [76]

WALTER BOCK

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

By Mr. Fihe:

Q. Mr. Bock, you testified regarding a transaction wherein the defendant in this case had returned to your company the sum of $25.00, which had been paid to him in error.

In that connection, we presented Plaintiff's Exhibit 39, which is a photostat of the check you testified was the refund check.

Will you look at that again, Mr. Bock, and tell us, please, the date of that check?

A. The date on here is September 30, 1954.

(Testimony of Walter Bock.)

Q. When was this transaction which involved the refund of the $25.00?

A. That happened in 1953.

Q. So what is your conclusion about this particular check?

A. That I had——

Mr. Mason: I object to the witness stating his conclusion. [77]

The Court: May I have it read?

(The question was read.)

The Court: Sustained.

Q. By Mr. Fihe: And is that, to the best of your knowledge, the actual refund check received at that time?

A. This is not the check, because I noticed the date of '54. And the incident I referred to happened in 1953.

I had called the Chicago office this morning, asking them would they please look for the right check and send it down here, and that is what they are doing now.

Q. What do you mean by "the right check"?

A. The check implied on my testimony yesterday of being sent to National Transfer instead of National Van Lines.

Q. You mean you called Chicago to ask for the original check refunded to you in 1953, or photostat of that check?

A. A photostat of that check.

Q. What did Chicago tell you they would do?

(Testimony of Walter Bock.)

A. They were going to search the records and advise me.

Mr. Fihe: If the court please, if the proper photostat is found may we have permission, and permission of opposing counsel, to substitute the photostat, instead of this one which was perfectly legitimate transaction. We just happened to get the wrong photostat. [78]

Mr. Mason: I am a little confused. I thought this was a photostat of the check.

Mr. Fihe: That is a photostat of a refund which was relating to an entirely different transaction, Mr. Mason, that occurred very recently.

The refund to which the witness was referring yesterday related to the collection by the defendant in error of an insurance premium paid by one of our customers to the defendant. And that was the purpose of the offer of the exhibit yesterday, in order to prove more of this confusion which we are alleging. But we just happened to get the wrong check, I am sorry to say.

The Court: Now you wish to substitute the right one?

Mr. Fihe: If we can, please.

The Court: If you get it, bring it in and we will receive it.

Mr. Fihe: Whether or not we can get it in time from Chicago is the question, your Honor. But if Chicago finds it, they will air-mail it out here.

I may have to come in next week sometime and

(Testimony of Walter Bock.)

make the substitution. I will present it to Mr. Mason first.

Mr. Mason: I won't object to it being a photostat, but I don't know what it is all about so far.

The Court: You don't have a copy of it here?

Mr. Fihe: No, it went to Chicago. [79]

The Court: This is the day of trial, the day we have to receive the evidence. The court isn't going to be here next week. If you want your case to go into the second quarter of 1955, and this is an important bit of evidence, we will consider whether to put it over that far. Otherwise, we will just take such evidence of the transaction that is available and then submit the matter.

I would like to close the case in 1954, if we can.

Mr. Fihe: We understand that, your Honor.

May we have permission then, if the court please, and counsel, to withdraw this particular exhibit, because it is not the right exhibit. And so far as the actual exhibit——

The Court: All right.

Mr. Fihe: ——the proper photostat is concerned, it is not particularly important. The testimony does show that such a transaction occurred, and I am sure that that will suffice.

The Court: The exhibit may be withdrawn.

Mr. Fihe: Maybe I had better take it out now, if the court please.

Will you destroy your copy, Mr. Mason? Just mark it canceled or something.

Mr. Mason: Yes.

(Testimony of Walter Bock.)

Q. By Mr. Fihe: How many trunk lines, telephone lines, go into your place of business, Mr. Bock? [80] A. Seven.

Q. Are incoming calls always correct?

A. Most all the time.

Q. Which ones are referred to you as incorrect?

Mr. Mason: Just a moment. I will object to that on the ground there is no proper foundation that has been laid. There is no testimony here this witness is a telephone operator.

The Court: Sustained on the basis of foundation being inadequate. I don't think he has to be a telephone operator in order to establish a foundation.

Mr. Fihe: Mr. Bock testified he is the manager, and I am just asking him if any calls are referred to him as incorrect calls. I may phrase the question slightly differently.

Q. By Mr. Fihe: Are any calls referred to you which the telephone operator cannot handle?

A. That is right.

Q. What is the nature of those?

A. Well, shippers inquiring regarding their shipments, that we don't have any record of. And they become pretty upset about it and insist on talking to the manager.

The trend of the conversation on most of them was that a National truck picked their furniture up and they are trying to locate it out here. [81]

Mr. Mason: Just a moment. I move that answer be stricken as hearsay.

(Testimony of Walter Bock.)

Q. By Mr. Fihe: Who answers that telephone call for the manager?

The Court: Just a moment, until there is a ruling on the motion.

It is this witness' description of the type of call which he received. It is not offered, as I understand it, for the truth of what was told him, but rather as a description of a telephone conversation which shows confusion, so the motion to strike is denied.

Q. By Mr. Fihe: Will you continue with your answer, please, Mr. Bock?

A. Yes. Some of the shippers that call tell me that all they know is they saw "National" on the van and they had talked to the dispatcher, and they can't get no information. What kind of company are we running?

I try to question them as to where it was picked up, and I go to the dispatcher's office and check the manifest; probably the dispatcher had overlooked it, and I find we have nothing on it.

I finally refer the people to National Transfer, advising them there is such a company. And they ask me for their phone number and I look it up in the phone book, or some of them look it up themselves; and that is the end of the calls. [82]

Q. About how often does that happened?

A. I would say in the past year I have received about eight calls.

Q. Of that nature?

A. That is right, sir.

(Testimony of Walter Bock.)

Mr. Fihe: Will you please mark this booklet as Plaintiff's Exhibit 40?

The Clerk: 40 for identification.

(The document referred to was marked Plaintiff's Exhibit 40 for identification.)

Q. By Mr. Fihe: I show you a booklet, Mr. Bock, marked Plaintiff's Exhibit 40 for identification. Will you please tell the court what that is?

A. This is a picture of a Howard Van Lines truck, with "National Transfer & Storage" and its emblem under the name of "Howard".

Q. How many pictures are in that booklet?

A. There are three pictures.

Q. Who took the pictures? A. I did.

Q. When? A. Sometime in June 1951.

Q. Who is the Howard Van Lines? What is it?

A. Howard Van Lines is a long-line carrier and strictly our competitors. [83]

Q. What do you mean "long-line"?

A. Cross country.

Q. Will you tell the court more specifically what emblem appears on the trucks in those pictures?

Mr. Mason: I think the exhibit speaks for itself, and I object to it on that ground.

The Court: The pictures do speak for themselves.

Mr. Fihe: I offer the booklet containing the three photographs in evidence as Plaintiff's 40.

The Court: Received.

(The document heretofore marked Plaintiff's Exhibit 40 was received in evidence.)

(Testimony of Walter Bock.)

Mr. Fihe: I will ask the clerk to mark this, please, for identification.

The Clerk: 41.

(The document referred to was marked Plaintiff's Exhibit 41 for identification.)

Mr. Fihe: It is an envelope with contents; Plaintiff's Exhibit 41.

Q. By Mr. Fihe: Mr. Bock, I show you Plaintiff's Exhibit 41 for identification, and ask you to state if you recognize that envelope.

A. I do.

Q. Where did you first see that envelope?

A. In our Los Angeles office. [84]

Q. When? A. Yesterday morning.

Q. Who opened that envelope?

A. I did.

Q. Will you now remove the contents and tell the court what you found inside?

A. This envelope came — the outside envelope came from our agent Oakland Moving & Storage Co. at Oakland, California, addressed to "National Van Lines, Inc., 1855 Glendale Boulevard, Los Angeles 26, California."

When I opened the envelope I found an envelope here with a return address on it by Dean Van Lines, addressed to "National Van Lines, 3330 14th Ave., Oakland, California."

Q. May I interrupt, please, Mr. Bock?

Mr. Fihe: I will ask the clerk to kindly mark this Dean Van Lines envelope for identification as Plaintiff's exhibit.

(Testimony of Walter Bock.)

The Clerk: 42.

(The envelope referred to was marked Plaintiff's Exhibit 42 for identification.)

Q. By Mr. Fire: In what condition was the envelope from Dean Van Lines when you received it? A. Well, as it is now.

Q. Opened?

A. Something else in there—— [85]

Q. Was it opened? A. It was opened.

Q. And what did you do with it?

A. Well, I opened the inside and found another envelope addressed to "National Van Lines, 4250 Horton Street, P.O. Box 184, Oakland, California," and it came from Mollerup Moving & Storage Co. at 133 North First West Street, Salt Lake City, Utah.

Q. How do you spell that?

A. M-o-l-l-e-r-u-p.

Mr. Fihe: Will the clerk kindly mark the Mollerup envelope for identification as Plaintiff's Exhibit 43?

The Clerk: 43.

(The envelope referred to was marked Plaintiff's Exhibit 43 for identification.)

Q. By Mr. Fihe: In what condition was this Mollerup envelope when you got to it?

A. That was open.

Q. Did you find anything inside?

A. Yes, I found a letter and a copy addressed to "National Van Lines, 4250 Horton Street, Oak-

(Testimony of Walter Bock.)

land, California," from the Mollerup Van Lines, interoffice correspondence from Salt Lake City.

This is re a claim of Technical Sergeant Wilmer L. Wilson, GBL-AF 2876360, at George Air Base, Air Force, [86] Biloxi, Mississippi.

Q. What is the date of that letter?

A. December 7, 1954.

Q. Is that the only thing you found inside that Mollerup envelope?

A. No, there was another letter addressed to Dear Sirs, and it was marked to the Claims Department of the Atherton Transfer & Storage Co.

Q. Signed by?

A. Signed by Mollerup Van Lines, Joseph E. Kearsley.

Q. Dated?

A. There is no date on here. And it is addressed to the same claim, Wilmer L. Wilson.

Mr. Fihe: May I ask the clerk, please, to mark the Mollerup Van Lines interoffice correspondence letter for identification as Plaintiff's Exhibit 44, and the carbon copy of the letter signed by Mr. Kearsley of Mollerup Van Lines for identification as Plaintiff's Exhibit 45.

(The documents referred to were marked Plaintiff's Exhibits 44 and 45 for identification.)

Mr. Fihe: I shall now offer the three envelopes with the two letters as the respective plaintiff's exhibits.

The Court: Received.

(Testimony of Walter Bock.)

The Clerk: 41 through 45 in evidence.

(The documents heretofore marked Plaintiff's Exhibits 41 to 45, inclusive, were received in evidence.) [87]

Q. By Mr. Fihe: How often do mistakes like this happen, Mr. Bock?

Mr. Mason: I object to that as no foundation being laid and calling for a comparison and a conclusion.

I don't know what he means by "like this". There is no testimony that anything like that ever occurred before.

The Court: In the present form the objection is sustained. You may ask him how frequently instances of confusion have occurred, but the court will consider the ones which are then particularized.

Mr. Fihe: Thank you, your Honor.

Q. By Mr. Fihe: How often do these instances of confusion occur, Mr. Bock?

A. Are you referring to both phone calls and mail?

Q. Mail now, particularly.

A. Well, that has occurred, I would say, about four or five times a year, to my knowledge.

Q. What do you plan to do about this particular instance, or what can you do about it?

A. This last one here, I checked yesterday morning on the claim and that shipment doesn't even belong to us and it doesn't appear like we even handled it.

(Testimony of Walter Bock.)

Q. It was obviously sent to the defendant here, correct? A. That is right. [88]

Mr. Mason: That calls for a conclusion; leading.

The Court: Sustained.

Mr. Fihe: You may cross-examine.

Cross Examination

By Mr. Mason:

Q. Mr. Bock, on these telephone calls you referred to, you state that the person calling was confused as to the word "National", is that correct?

A. That is right, sir.

Q. How do you know that he was not confused as to some other trucking company doing business under the name of National, as distinguished from the defendant in this case?

A. Well, during my conversation, when I referred them back to National Transfer I asked the shipper if they didn't get any information through that call, to call me back, and I would check further for them through the I.C.C. And I didn't get any calls back from them.

Q. But you don't know what they eventually found out, do you?

A. No, sir, they didn't call me.

Q. You don't know whether the National Transfer & Storage, the Dean Transfer and Storage referred them to somebody else, do you?

A. I beg your pardon? [89]

Q. You don't know whoever this customer called,

(Testimony of Walter Bock.)

in response to your suggestion, might have told them to call somebody else, do you?

A. That I couldn't say; I don't know.

Q. Haven't you had instances of confusion arising from the fact that other companies in Los Angeles use the name "National"?

Mr. Fihe: That is objected to; improper cross, your Honor.

The Court: Overruled.

The Witness: I haven't had any, to my knowledge.

Q. By Mr. Mason: You are aware, are you not, there are others in Los Angeles in the trucking business using the word "National" as a prefix to their name? A. No, sir,——

Mr. Fihe: Same objection.

The Witness: ——I am not.

Mr. Fihe: I object; improper cross. He is asking about third parties.

The Court: Overruled. But only insofar as this man knows or has observed.

Q. By Mr. Mason: You have never had occasion to look at the telephone book to see what other companies in this business do use the name "National" in Los Angeles?

The Court: Mr. Fihe, we have to get the setting of [90] this case in the commerce of the community. And a mark gains strength with monopoly, and strength diminishes with commonplace characteristics of the mark.

I don't think that if other concerns used "Na-

(Testimony of Walter Bock.)

tional" that that is controlling, but it is one of the factors to be considered.

No one would probably contend here that National Biscuit Company, for instance, or National Lead are infringing upon this plaintiff's mark, or that this plaintiff is infringing upon theirs. They all have valid marks, which is the word "National".

But we should have something of the way in which the word "National" is used in marks, in order that we may get the setting of this particular case and do equity.

We have had enough people testify here and have taken enough evidence that by this time I would naturally have some impression of the case.

Now, I will tell you and Mr. Groen what my tentative thought is about it. It seems to me that the defendant, by the use of his "National Transfer & Storage," has prima facie infringed National Van Lines because of the direct competition. And there has been some evidence of confusion already.

I expect before the day is out we will have more, if the case follows the usual line of these cases.

I don't see at the moment how the use of an outline map [91] of the United States, with the vertical bars, sometimes black and white and sometimes red and white, infringe a background material of a shield with similar bars.

It seems to me that the use of black and white or red and white in up-and-down bars is something which is so common and in the public domain that where the outline material or the borders of the

(Testimony of Walter Bock.)

outline are different, as they are here, that is, one side having a shield, the other party having an outline of the United States, that that in itself is offensive.

But the wording which the defendant uses, according to the present testimony, definitely is an infringement, if the evidence is consistent to the end of the case with the evidence which is presently before us.

Now, that is just tossing out the court's present view. Many times these tentative views, expressed in the course of trial, are changed. But if you don't know what they are, you don't know what to work on.

Mr. Fihe: Thank you, your Honor.

Q. By Mr. Mason: Mr. Bock, isn't it a fact that you know National Nation-Wide Movers are doing business in the moving business in Los Angeles? A. No, sir.

Q. Don't you know that the National Lines is doing business here in Los Angeles? [92]

A. National Lines?

Q. Yes.

A. National Lines put in the phone book—if you want to know the reason, it was to combat the competitors using National Van Lines for their own benefit.

The Court: You can't tell us what the purpose was.

The Witness: I am just giving an opinion on National Lines.

(Testimony of Walter Bock.)

The Court: An opinion is something which witnesses are not allowed to give. The law doesn't allow it.

The Witness: I was the one that put the ad in the phone book, sir.

The Court: You can state what you did. But the inferences that are to be drawn from what you did are something which have to be either argued by counsel or reasoned out by the court.

The Witness: All right, sir.

The Court: I am sorry, but those are the rules of evidence and they are much older than either you or I. And I think we had better stand by them.

Q. By Mr. Mason: You are certainly familiar with the fact that the National Carloading Company does business here?

A. They are a freight line.

Q. They haul furniture, move furniture? [93]

A. No, sir, they are a freight line.

The Court: What do you mean "freight line"?

The Witness: They handle crated merchandise, and we don't.

The Court: Do they use trucks?

The Witness: Yes, sir; freight trucks.

The Court: What do you mean by "crated merchandise"?

The Witness: Well, they have their interstate commerce rights to haul freight, and we have ours just to haul household goods. They are a different company than a van line.

(Testimony of Walter Bock.)

The Court: Do they handle household goods, to your knowledge?

The Witness: If it is to be crated and shipped by train.

The Court: What if it is to be shipped by truck?

The Witness: They do not handle it.

The Court: Is there some characteristic in the way in which you handle household goods which is peculiar to your particular type of business?

The Witness: Well, yes. Our movements of household effects are all blanket wrapped. They are not crated.

The Court: Do you use railroad cars?

The Witness: No, sir, we do not.

The Court: All right.

Q. By Mr. Mason: Is it your statement that your [94] company is the only one that handles blanket-wrapped furniture?

A. No, sir, I never said that.

Q. Aren't you familiar with the fact that National Trailer Convoy operates out of Los Angeles?

A. National Trailer Convoy?

Q. Yes.

A. Will you clarify that, please?

Q. Well, if you are not familiar with it, just say no.

A. Are you referring to trailers, rentals?

Q. Moving business.

A. Moving business? Trailer convoys?

Q. Yes, sir.

A. No, sir, I never heard of it.

(Testimony of Walter Bock.)

Q. Now, referring to this transaction about which you testified and which relates to Exhibits 41, 42, 43, 44, and 45, in what way does the—or is the Dean Van Lines connected with that transaction, if you know.

A. I will try and explain it, why I connect Dean Van. You asked me a question and I want to answer it.

Q. If you know.

A. The envelope that this was addressed to——

Mr. Fihe: The exhibit number?

The Witness: 42. The envelope that was addressed with this material in, was addressed from a Dean Van Lines envelope. [95]

Q. By Mr. Mason: Then Exhibit 43 was Mollerup Moving & Storage Company envelope?

A. That is right, sir.

Q. You don't know whether the confusion was with respect to Mollerup Moving & Storage Co., the National Van Lines or the Dean Van Lines, isn't that correct?

A. I do. Mollerup Van Lines is addressed to National Van Lines in Oakland, and the Dean envelope was sent to National Van Lines in Oakland, also.

This Dean Van Lines is an envelope, is from either Dean or an agent of theirs.

The Court: Do you contend, Mr. Fihe, this Dean Van Lines insignia, as it appears upon the Exhibit 42, infringes the plaintiff's mark?

Mr. Fihe: Oh, my, yes, your Honor.

(Testimony of Walter Bock.)

The Court: What is there about that that is infringing?

Mr. Fihe: The vertical stripes are the outstanding part of the mark, and they are exactly copied from the plaintiff's trade-mark.

The Court: Aren't they common throughout commerce?

Mr. Fihe: Not too common, your Honor.

The Court: It just looks like a barber pole or a candy stick of the olden days. But the Dean Van Lines' isn't that distinctive. It certainly is distinguishable from [96] National Van Lines.

Mr. Fihe: When the suit was started, your Honor, the defendant was still using the word "National". That change has been made since the suit was started.

Unless we have a ruling from this court we have no guarantee that he will not go back to that word "National" again.

The Court: I am just trying to get the issue, because I don't recall—I might have been remiss in going over the material introduced at pretrial—but I don't recall seeing anything like 42 until this witness came to the stand.

Mr. Fihe: I don't believe there is anything like that in here. Most of the other material we put in on behalf of the plaintiff did include the word "National" with the red vertical stripes; sometimes in other colors. Of course, in the telephone directories the colors don't show; just the black stripes.

The Court: I notice in a great many of the

(Testimony of Walter Bock.)

exhibits they are black and white stripes, and in others, red, white, and blue.

Mr. Fihe: Yes. Wherever colors are not possible, they are black and white, in some of the brochures, the advertising material that is used.

The predominant feature we rely upon and upon which we believe confusion is taking place, and we so allege, is the [97] combination of those vertical stripes with, in many instances, the word "National" and as they appear in our exhibits, particularly in those telephone directors. A customer of the plaintiff, having recognized the plaintiff's device and its emblem and services, will almost inevitably look for that particular emblem.

I don't want to proceed to argue the case, but that is our contention.

The Court: We want to try to get the issues straight, because I couldn't quite place Dean Van Lines into the issues as originally framed.

Mr. Fihe: Yes. As I explained, that was changed while the suit was pending.

The Court: Then we are going to have a problem here of determining whether an outline of the United States with vertical stripes infringes a shield with vertical stripes.

Mr. Fihe: Quite true, your Honor. You have just boiled it down to exactly that question.

The Court: Well, it boils down to that question. I don't think I did it, particularly.

Mr. Mason: Was there a question pending?

(The record was read.)

(Testimony of Walter Bock.)

Q. By Mr. Mason: As a matter of fact, Mr. Bock, you don't know of your own knowledge whether that was carelessness or confusion, do you?

A. Well, with Mollerup Moving & Storage being in the business, and has our addresses, I just want to point something out here, that Mollerup is evidently doing some work in behalf of National Transfer, but he sent this and addressed it to National Van Lines.

Mr. Fihe: Now you are talking about Exhibit——

The Witness: Exhibit 43.

Mr. Fihe: The Mollerup envelope is Exhibit 43.

The Witness: Yes.

Mr. Fihe: Now, you picked up another one. What is that exhibit number?

The Witness: Mollerup Moving & Storage, addressed to National Van Lines, to P.O. Box 184, Oakland, which is National Transfer's address. We don't have a place of business up there, and there is the confusion.

Q. By Mr. Mason: Now, the transaction to which this relates, which was a claim for an antenna, the claim was submitted by the claimant to the Atherton Transfer & Storage Co., is that right?

A. That is correct, sir.

Q. So that the person who had used the services, he had confused it with the Atherton Transfer & Storage Co.?

A. No, sir. Atherton Transfer & Storage Co. is not our agent.

(Testimony of Walter Bock.)

Q. Well, can you explain why the claimant submitted [99] his claim——

A. There the confusion lies. National Van and National Transfer; I can't account for it.

Q. Is there any connection between the Atherton Transfer & Storage and the defendant in this case?

A. Atherton Transfer & Storage, there is a connection between them and Mollerup. And Mollerup does work for National Transfer, and that is why they sent the letter up to Mollerup.

Q. There is nothing in this letter here——

Mr. Fihe: Exhibit what?

Mr. Mason: Well, all these exhibits, 41 to 45.

Q. By Mr. Mason: Is there anything in either of those exhibits to indicate that the claimant, Sergeant Wilmer L. Wilson, who was the person that used the services, had any thought in mind that he was dealing with the defendant company?

A. I don't know what he had in mind.

Q. Now, I refer you to Exhibit 38, which is a bid apparently for some Government hauling. Do you know who made—or who struck out the line "124 North Center Street" and inserted in pen "1855 Glendale Boulevard"?

A. That is the Post Office Department did that.

Q. And this address, "1855 Glendale Boulevard," whose address is that? [100]

A. That is National Van Lines' present address.

Q. So you don't know whether that was a matter of confusion or just carelessness on the part of the Post Office Department?

(Testimony of Walter Bock.)

A. There is no carelessness. The address is on the top, National Van Lines.

Q. In addressing this to you——

A. Pardon me. This is our previous address, 124 North Center Street. We were there 11 years and then moved to 1855 Glendale Boulevard. We made a post office change of address with the Post Office Department. That is addressed to National Transfer & Storage and not National Van Lines.

Q. You don't know of your own knowledge whether that was merely carelessness or confusion?

A. It is confusion. It was confusing to the Government.

Q. You don't know of your own knowledge whether the Government just didn't take the time to look it up?

A. It is still confusion to the Government if they sent it to some other address on some other name.

Q. It is your claim then the Government could not have been careless?

A. They were confused.

Q. You introduced a photograph that was taken in 1951.

A. Yes, that is right, sir. [101]

Mr. Mason: That is all.

Mr. Fihe: Thank you very much, Mr. Bock.

(Witness excused.)

Mr. Groen: Your Honor, I have one more short witness we would like to put on before we put Mr. McKee back on the stand. Is that all right?

The Court: Surely.

SNOWDEN MORRIS HUNT, JR.

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated.

Your full name, sir?

The Witness: Snowden Morris Hunt, Jr.

The Court: Sir, this is a large room. You will have to speak out.

The Witness: I will try.

Direct Examination

By Mr. Groen:

Q. Will you please state your occupation?

A. Account executive for Jerry Wade Advertising.

Q. Do you do work for National Van Lines, Inc.? A. Yes.

Q. I am showing you Exhibits 36 and 36-A, and I will ask you if you are familiar with those.

A. Yes, we prepared that. [102]

Q. Was that the basic material or a film that you produced? A. Yes, sir.

Q. When was that produced?

A. We started production in July, and it was finished roughly, September 15th.

Q. How many films did you make from that?

A. We made a hundred prints.

Q. What is the purpose of those films?

A. To use on television stations and the major national markets, that is, national cities, marketing areas.

(Testimony of Snowden Morris Hunt, Jr.)

Q. Do you have that film with you?

A. Yes.

Q. How long will it take to show it?

A. A minute film. It runs 57 seconds, technically.

Q. That has been aired over TV?

A. Yes, the first run was about October 15th in Dallas.

The Court: Of what year?

The Witness: Of this year.

Q. By Mr. Groen: It is being placed in the hands of National Van Lines and its agents?

A. Together, I would say about between 15 and 20 agents now have it for use with their areas, and we are placing it in some 43 markets for National Van Lines, Inc.

Q. Dollarwise, how large a product is this?

A. $100,000.00.

Q. How is this paid?

A. A third by the agent and two-thirds by National Van Lines, Inc.

Mr. Groen: Can we show the film quickly, if the court please. It will just take a minute.

Mr. Fihe: Can you see that from where you are?

The Court: Yes. If I don't see it I will stand up and come down to where I can see it.

Counsel have ordinarily found it more practical to put the screen back a little further.

Mr. Fihe: We need a shorter distance; a peculiar focal length, your Honor.

The Court: I am not going to try to engineer your performance.

(Testimony of Snowden Morris Hunt, Jr.)

Mr. Fihe: As we mentioned, this is to the tune of Oh, Susanna.

(Whereupon, the sound film of Exhibits 36 and 36-A was shown audibly as follows:)

"Toot, toot.
"Call National Van Lines
"For a move that's safe,
"And free from care. . . .
"You'll find our service thorough,
"We can move you anywhere! [104]
"National Van Lines
"Call us, we'll do the rest . . .
"For the finest service,
"Lowest rates, you'll find we are the best!
"Finest service—you bet!
"Pick up your phone . . . make a call,
"That one call does it all!
"Each move is pre-planned carefully,
"By National—the Pioneer Moving Company.
"Bonded packers pack for you,
"Fragile items,
"Clothing, too!
"Our Super Vans,
"Always hygienically clean,
"Are weatherproof, too,
"And, the safest you've seen.
"And, once they're packed
"And on their way,
"In that one Van
"Your goods will stay!
"Once we've arrived,

(Testimony of Snowden Morris Hunt, Jr.)

"To make moving complete,

"We store or unpack, and,

"Make everything neat!

"National Van Lines [105]

"Call us, we'll do the rest. . . .

"For finest service,

"Lowest rates,

"You'll find we are the best. . . .

"For the National office nearest you, look,

"In the yellow pages of your telephone book!

"National Can Save You Enough To Pay

"Your Own Driving Expenses To Your New Home!"

Mr. Green: You may cross examine, Mr. Mason.

Cross Examination

By Mr. Mason:

Q. Mr. Hunt, do I understand you prepared that complete in September of this year?

A. Yes.

Q. And just where has that been shown?

A. I know specifically it has been shown in Dallas, because under the Screen Actors Guild regulations we are required to pay talent each quarter, and I know specifically Dallas was the first station that actually ran.

Q. What station was that?

A. I don't remember it, sir. There are three stations in the Fort Worth-Dallas area. I can call my office and check it, if it is important.

Q. You don't know of your own knowledge

(Testimony of Snowden Morris Hunt, Jr.)
whether it has been shown any other place, do you? [106]

A. No, we don't have to.

Mr. Mason: That is all.

Mr. Groen: Mr. Hunt, will you withdraw that film?

I would like to offer it in evidence as Plaintiff's Exhibit No. 46.

We will be delayed slightly by having it taken out and handed to the clerk.

The Court: It will be received.

(The film referred to was marked Plaintiff's Exhibit 46 and was received in evidence.)

Mr. Groen: That is all, Mr. Hunt. Thank you.

(Witness excused.)

Mr. Groen: Mr. McKee, will you resume the stand?

You may cross examine, Mr. Mason.

FRANK L. McKEE

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination

By Mr. Mason:

Q. Mr. McKee, you testified, did you not, that you were not with the plaintiff corporation, National Van Lines, Inc., when it was first organized?

A. I was on the West Coast at the time. I went back shortly after the date of its incorporation. I

(Testimony of Frank L. McKee.)

was managing [107] the Los Angeles office in 1931.

Q. For your father? A. Yes, sir.

Q. And it was after the company was incorporated that you went back to Chicago and became connected with the plaintiff corporation?

A. Yes, sir.

Q. Were you still operating for your father in Los Angeles when the plaintiff corporation started business? A. Yes, sir.

Q. Now, you also testified, did you not, that plaintiff corporation acquired your father's business, is that correct? A. Yes, sir.

Q. Do you have any document showing such a transfer from your father to the palintiff corporation? A. No, sir.

Q. And you were not there at the time the transfer was made? A. No, sir.

Mr. Mason: Your Honor please, I move to strike the witness' testimony that the plaintiff corporation acquired the prior business, on the ground that there is no foundation and purely hearsay so far as he is concerned.

The Court: What about it? [108]

Mr. Groen: The record shows, I believe, that Mr. McKee is president of National Van Lines, Inc., and as an officer he has familiarized himself undoubtedly. I could ask some more questions along that line, about the history of the business.

The Court: Is that an exception to the hearsay rule? I know matters of family and history and pedigree are. I never before heard it suggested that

(Testimony of Frank L. McKee.)

matters of corporate history were exceptions to the hearsay rule.

Mr. Groen: I have had that question come up before, especially in large corporations, where you might have to have 10 or 15 people to testify, to establish one little fact.

A person, executive in charge of records, also in the company and close to it, is qualified to testify about historical events. And I think Mr. McKee has served in that capacity.

And, furthermore, I believe the record shows that even while he was not directly in that office he was also in the moving business at the time, and that he was in communication, that he knows that the material was taken over.

We further have some of these photographs in evidence.

The Court: They are not moving to strike that. At least, they don't have that motion pending.

Mr. Groen: I don't know exactly how broad——

The Court: The motion to strike, as I understand it, is simply as to corporate history prior to the time this witness became associated with the corporation.

Mr. Mason: That is right, your Honor.

Mr. Groen: Could I ask Mr. McKee a question or two at this time about his background?

The Court: Yes.

Mr. Groen: Mr. McKee, when you came with National Van Lines, Inc., were you familiar with the past transactions?

(Testimony of Frank L. McKee.)

The Witness: Yes, sir.

Mr. Groen: Did you familiarize yourself with the past transactions?

The Witness: Yes.

Mr. Groen: Do you know as a fact that National Van Lines, Inc. took over the business and assets of National Shippers and Movers?

The Witness: Yes, sir. I was connected in 1937 and prior to that I had been a salesman, working out of the Chicago office. I was there shortly after the date of incorporation and had seen the records, even produced the corporate papers.

Mr. Groen: Have you had occasion to see records or papers when you first came with National Van Lines, Inc., which would show they took over, succeeded to the business of National Shippers and Movers? [110]

The Witness: Yes, sir.

Mr. Groen: And prior to your time of coming with the National Van Lines, Inc., were you in communication with your father or your father's business?

The Witness: Yes.

Mr. Groen: Did you know what he was doing?

The Witness: Yes, sir.

Mr. Groen: And did you know he subsequently organized the National Van Lines, Inc.?

The Witness: Yes, sir.

Mr. Groen: You know that of your personal knowledge?

The Witness: Yes, sir.

(Testimony of Frank L. McKee.)

Mr. Groen: That is all.

Q. By Mr. Mason: Well, are those documents of transfer in existence?

A. What documents there are would be in the Chicago office.

Q. What documents were they?

A. Well, there were a few pieces of equipment transferred from National Shippers and Movers to National Van Lines at the date of incorporation, and there were some loading equipment and warehouse equipment also transferred at that time.

The Court: What was the date of incorporation?

The Witness: June 1934. [111]

Q. By Mr. Mason: Well, were those bills of sale that you saw—I am trying to find out now—you said you familiarized yourself with it after you went back to Chicago.

I want to know what you saw.

A. I know of the equipment records because that equipment was in existence for years after. And then the—some of our own corporation documents also indicated such change.

Q. What corporation documents, now, are you referring to?

A. I believe the minutes, and there was also—I mean this all came up at the time of our grandfather hearing, application.

Q. Well, do you recall seeing any instrument of assignment or transfer or bill of sale signed by your father, transferring the prior business to the plaintiff National Van Lines, Inc.?

(Testimony of Frank L. McKee.)

A. I don't recall at the moment seeing a bill of sale. I may have seen it, but I don't recall it at the moment.

Mr. Mason: Your Honor, please, this, of course, is an important matter and I renew my motion and also add that this witness' oral testimony is not the best evidence of a transfer, if one actually took place. His testimony does not show any definite transfer.

The Court: Of course, Mr. Mason, you have this witness' testimony concerning the activities of the plaintiff from a [112] date in 1934 on to this date.

So I don't know that it is too critical of what went on before, although plaintiffs in this type of case like to carry their title and good will back as far as they can.

You recall the Smirnoff case. They carried it back, I think, to Russia and France, over a hundred years ago. But it isn't necessary to establish good will, that it existed for so long.

I think your point might not be too important, but as a point of evidence, it is a point of admissibility of the evidence.

Now, I think the motion to strike probably should be granted, but I am not sure.

Mr. Mason: May I say a word?

The Court: The motion to strike, as I understand it, goes only to the corporate history prior to this witness' association with it.

I will take that under submission and do a little reading on it, because it is a question I didn't an-

(Testimony of Frank L. McKee.)

ticipate would arise here, and I have no familiarized myself with that facet of the hearsay rule recently.

Mr. Mason: If your Honor please, I understand you will take it under submission. It will become important later in the case, and I am not challenging the fact that his father might have carried on the business. He has some [113] pictures which indicate he did.

The only thing I am challenging is that the present corporation acquired the previous business in such a manner it can carry anything back to the date of first use by his father. That is my point.

The Court: Well, that is a point we will have to consider. You don't want me to rule offhand here, do you,——

Mr. Mason: No, your Honor.

Mr. Groen: May I make one statement?

The Court: ——without having any cases cited to me and not having time to look them up. I don't keep the books up here on the bench.

Mr. Mason: I don't want your Honor to rule on it now.

Mr. Groen: For the record, whether or not there was a formal bill of sale may not be critical at all. The witness testified he doesn't know whether there was or not. I think the record is clear that he knows the physical assets were transferred. We have physical exhibits in evidence showing trucks used by National Shippers and Movers, and then went to National Van Lines.

(Testimony of Frank L. McKee.)

The Court: That isn't part of the motion to strike though, as I understand the motion.

Mr. Groen: Wouldn't that establish the fact——

The Court: You might establish it by many different ways. [114]

Mr. Mason: The fact he might have bought a truck or two doesn't mean he bought the business. I could buy a General Motors truck; that doesn't mean I get with it the General Motors trade-mark.

The Court: Are you contending Mr. Dean acquired the business that existed prior to '34?

Mr. Mason: No, your Honor. The evidence will show that the National Van Lines was a late comer in the field, under that name.

Under the law of trade-marks the first to use it is the owner of it. It goes to ownership of the plaintiff's trade-mark, and it also goes to statements made under oath in the applications for registration of these trade-marks.

Mr. Fihe: May I interrupt? You are not contending, are you, Mr. Mason, the defendant has priority to the plaintiff?

Mr. Mason: No. But before you can pursue, you have to have title yourself.

The Court: Wouldn't the use to which they have testified that they have put this mark between 1934 and the inception of the action give them title as against this defendant?

Mr. Mason: Well, your Honor, they have to have title in order to get a valid registration. He has offered in evidence here and produced three regis-

(Testimony of Frank L. McKee.)

trations, which are [115] prima facie as for everything that is stated in the registration.

Now, what I am doing is I want to know that not only was the National Van Lines not the common law owner of the trade-mark as it necessarily would have to be when it registered the mark, but that it cannot go back to late 1928 or '29, as the witness testified. At best it is my contention that the plaintiff corporation cannot go back any earlier than 1934.

The Court: Does it have to in order to establish its priority to the defendant?

Mr. Mason: Insofar as trade-mark is concerned, your Honor, it wouldn't be necessarily in unfair competition. He is coming into court here with a trade-mark registration saying he is the owner of the trade-mark. He testified he is the owner of the trade-mark. Unless he was the first one to use it in that type of service he is not the owner.

The Court: Well, the motion to strike is submitted.

Q. By Mr. Mason: Now, isn't it true, Mr. McKee, that in forming the plaintiff corporation you and your father carried on another transfer and storage business under the name of National Transfer Company?

A. That was only in recent years.

Q. You did carry on such a business, did you not? A. Yes, sir. [116]

Q. When did you start it?

(Testimony of Frank L. McKee.)

A. Well, the National Transfer Company was started about three years ago.

Q. When was it terminated, if it was terminated? A. About a year ago.

Q. And that business was independent of the plaintiff, National Van Lines? A. Yes, sir.

Q. Was that business around Chicago?

A. It is a local company, that is right.

The Court: Local to Chicago?

The Witness: Pardon?

The Court: Local to Chicago?

The Witness: Local of Chicago, yes.

Q. By Mr. Mason: Did you do any interstate business? A. No, sir.

Q. Did you travel out of Chicago?

A. Pardon?

Q. Did you do any hauling out of Chicago?

A. No, sir.

Q. Does the National Van Lines do any hauling in Chicago?

A. It has an intrastate certificate, yes, sir.

Q. Does it do any local hauling within the bounds of California? [117] A. Yes, sir.

Q. Much? A. Not much.

Q. About what proportion of its business would be strictly intrastate in California?

A. Intrastate?

Q. Yes. Within the State.

A. I would be afraid to say. I really don't know.

Q. Now, did you, while you and your father were conducting this separate business under the

(Testimony of Frank L. McKee.)

name National Transfer, did you experience any confusion there as between your company the National Van Lines?

A. We established that name as further protection for our own name National Van Lines, so no one else could take the name National Transfer in the State of Illinois.

Q. This business was separate and apart from the plaintiff corporation, was it not?

A. Yes, but we merely wanted to get that name registered so no one else would grab onto it.

Q. You did operate under it, did you not?

A. Yes, sir.

Q. How many trucks did you have?

A. No trucks.

Q. How did you operate?

A. Merely a packing concern. [118]

Q. Did you obtain any license from the plaintiff corporation to use that name, National Transfer, in that business?

A. It was merely incorporated for the protective reasons as given.

Q. You just incorporated, but you did not get any authority from the plaintiff corporation to use it? A. Pardon?

Q. You did not get any authority from the plaintiff corporation to use that name National——

A. The plaintiff corporation is a family corporation, and we can give our consent to another corporation of our making.

(Testimony of Frank L. McKee.)

Q. But as a corporate matter, you did not give that consent? A. I gave my consent.

Q. Did you give it in writing?

A. I gave it verbally.

Q. You gave your own individual consent?

A. Yes, sir.

Q. Now, your father's business, the National Shippers and Movers, that had about two trucks, did it not?

A. To start with, yes, sir.

Q. Did it do any interstate business?

A. Yes, sir. [119]

Q. To what extent?

A. Across the country.

Q. How many trucks did it have when it ceased to do business in 1934?

A. I believe there were three company trucks and a couple of leased units.

Q. Are we talking now about National Van Lines?

A. National Shippers and Movers.

Q. Now, the National Shippers and Movers, that was your father's company. Were you employed in that business? A. Yes, sir.

Q. Now, the name National Van Lines, the first time that was used was when the plaintiff corporation incorporated in 1934, is that correct?

A. Yes, sir.

The Court: You can't show me except through counsel.

The Witness: O.K.

(Testimony of Frank L. McKee.)

The Court: We will take a recess in a little while. If they have overlooked something that should be presented, bring it to their attention.

The Witness: All right.

Q. By Mr. Mason: Now, I call your attention to Plaintiff's Exhibit 4-A, which is a registration 563,950, and the mark there registered is "National Van Lines, Inc.", is it not? [120]

A. Yes, sir.

Q. I call your attention to this statement:

"The service mark was first used by applicant's predecessor in title on or about October 1928."

Now, that statement is not correct, is it?

A. Yes, sir, it is correct.

Q. Didn't you just testify that your father did not use the name National Van Lines?

A. What was your first question?

The Court: Read the question.

(The record was read.)

Mr. Groen: May I call attention to the fact that "Van Lines, Inc." is disclaimed, separate and apart there?

Mr. Mason: You concede, do you not, what you have registered there is a composite mark, "National Van Lines"?

Mr. Groen: Applicant's disclaims the exclusive use of the words "Van Lines, Inc."

Mr. Mason: It is not your claim you registered the word "National" by itself?

Mr. Groen: That is the dominant part, yes.

Mr. Mason: I mean, let's not refer to the dom-

(Testimony of Frank L. McKee.)

inant part. You do not claim to register the word "National" by itself, do you?

Mr. Groen: Yes. [121]

Mr. Mason: Do you have a registration showing that?

Mr. Groen: Just this. I interpret it that way.

The Court: What do you mean by "this"?

Mr. Mason: He is referring to Exhibit 4-A, your Honor.

Mr. Groen: 4-A is the registration, your Honor.

To register a name you submit the whole part or the whole thing, the composite, to the Patent Office. If you have descriptive material, like "Van Lines, Inc.", you disclaim that. The registration is for "National", although it is shown as the composite. We very frequently have descriptive material right with the trade-mark, which is disclaimed, and that is what is done here. And that word "National" ties back to National Shippers and Movers.

The Court: You feel that "National" is not descriptive?

Mr. Groen: For this specific business it is descriptive, in a sense, of national work, but we are talking about a specific service of household moving and storage.

The Court: I see. Then you feel "Van Lines" is descriptive of your business, but "National" is not?

Mr. Groen: Well, like many marks today, you will find the dominant part is the mark that the ownership vests in; that is the real mark of identification.

(Testimony of Frank L. McKee.)

The other words used with it may be wholly descriptive, separate and apart. That is what we certainly are not going to try to stop, someone else using "Van Lines" or "Van" or [122] "Inc."

When we take the unit it is dominated by the word "National". Everything is disclaimed for registration purposes by the word "National"; we rely on that. We set that forth in the registration as actually used.

In other words, the Patent Office will not register wholly descriptive words which describe the service or the product. And in this case "National" does not describe what they are doing. "National" is their mark of identification, along with the stripes.

I may say this is a combination here. Stripes and the word "National", and "National" alone in the other.

Mr. Mason: Your Honor will recall counsel's argument in his opening statement, that you cannot dissect a trade-mark. That is what he is trying to do right now.

Mr. Groen: No, the mark is the stripes and the word "National". You can't dissect those. Those are the identifying features.

Mr. Mason: The mark, as I interpret it, is what is shown in this drawing (indicating).

Mr. Groen: Maybe that is a question for argument. The document speaks for itself.

Mr. Mason: Was there any question pending?

The Reporter: No.

Q. By Mr. Mason: The first time that the com-

(Testimony of Frank L. McKee.)

posite [123] mark shown in that registration, which has just been exhibited to you, No. 563,950, was used, was when the plaintiff corporation incorporated in 1934, is that not true? That is, the words "National Van Lines, Inc."?

A. Yes, sir.

Q. Now, I show you Registration 548,018, Exhibit 3-A, and I will ask you if it isn't true the first time that composite mark was used by the plaintiff or anyone else, or your father, was on July 21, 1934.

A. That was the date of incorporation. It could have been used even a little prior to that time, while we were trying to get the name incorporated.

Q. But not prior to 1934.

A. It could have been—the emblem could have been in use prior to the date of incorporation.

Q. You mean the emblem by itself?

A. The emblem and the name, while we were getting it incorporated.

Q. You have no personal knowledge of the fact it was, do you?

A. No. As I said, I wasn't there in '34.

Q. Is it your statement that the plaintiff corporation was the first to use the name "National Van Lines" in the transfer and storage business?

A. To my knowledge, yes, sir. [124]

Q. Now, don't you know, Mr. McKee, the name "National Van Lines" was adopted and used by a transfer company in Milwaukee, owned by a Mr.

(Testimony of Frank L. McKee.)

and Mrs. Mechanic, doing business under the name of National Van Lines?

A. Before National Van Lines?

Q. Yes.

Mr. Groen: Your Honor please, I don't think it is going to be necessary to enter any objections, in view of what your Honor said here about getting the whole setting and the background. I would like to make it clear at this point that alleged third parties' uses have no direct bearing on these cases. There is considerable law to support that. And we have to consider what has gone on between this plaintiff and this defendant.

In view of what your Honor said earlier, I am not going to make any further objection, except if it is clearly understood we can brief that point——

The Court: I understand that it is Mr. Mason's point, in order to valid the registration mark in the Patent Office, it is necessary that the person be the first user of the mark.

If that is so, would it not be admissible for him to show this party Mechanic was a user of the mark prior to the plaintiff or its predecessors?

Mr. Groen: That may have some bearing. But my whole [125] point——

The Court: That would not have any bearing, as I understand it, upon the law of unfair competition.

Mr. Groen: No, it wouldn't. But so far as this registration is concerned, it may have some bearing. My whole point there is there is much talk here by

(Testimony of Frank L. McKee.)

the defendant of third party uses. We maintain that third party uses on unfair competition, even for the trade-mark infringement, are not to be considered between the parties at litigation.

This defendant cannot justify his wrongs by the wrongs of others. There may be many issues, whether these other alleged uses are also infringements, and people that may be sued that are infringing. And that is something we can't go into in this case.

But I just want to make it clear in the record I am going to present the law on that fact, and that I don't want to take up any more time by further objections as to third parties' use.

The Court: All right. We will consider the question of relevancy of evidence of third party uses when the case is finally submitted.

Mr. Groen: Very well.

The Court: And at the present time I think it is entirely irrelevant, so far as the unfair competition phase is concerned, but possibly relevant upon the trade-mark cause [126] of action.

Mr. Groen: Very well, your Honor.

The Court: But that isn't a ruling. That is just a remark. You don't know to what extent I may need to be educated.

We will take our morning recess before we continue.

(Short recess taken.)

Q. By Mr. Mason: Before the recess I believe

(Testimony of Frank L. McKee.)

we were discussing the National Van Lines Milwaukee concern.

You are aware of the existence of that concern, are you not, Mr. McKee? A. Yes.

Q. You are aware of the fact it is doing an interstate business?

A. He operates between Wisconsin and Illinois.

Q. And that he has been doing that for some time? A. Yes, sir.

Q. It is true, is it not, in the current telephone directory in Milwaukee the name "National Van Lines", the Mechanic concern, appears immediately ahead of National Van Lines, Inc.?

A. I don't know what their position is in the directory.

Q. Has it come to your attention that any confusion has resulted because of the two companies doing business [127] under that name at Milwaukee?

A. The name of A. Mechanic in Milwaukee does give a great deal of difficulty to our agents in the City of Milwaukee.

Q. That may be vice versa, may it not?

A. The A. Mechanic company is only a two-state operator, and I don't know what difficulty you might have reference to.

Q. Isn't it true that in 1949 when that company, Mechanic company, incorporated and transferred its assets to the present corporation, National Van Lines, and applied to the Public Service Commis-

(Testimony of Frank L. McKee.)

sion of Wisconsin for a transfer of its license, the National Van Lines filed an opposition to that?

A. I believe we did.

Q. And there was a hearing on it, was there not?

A. I didn't attend it. I don't know how much of a hearing it was.

Q. As a matter of fact, you abandoned your opposition, did you not?

A. I don't remember what the outcome was, sir.

Q. You do know that you did not prevent them from transferring, do you not?

A. If I remember correctly, there was nothing we could do at the time to avoid this situation.

Q. As a matter of fact, didn't they show in that hearing they had entered the field prior to the National Van Lines?

A. I do not recall that. As a matter of fact, Abe or A. Mechanic was an agent for National Van Lines in the early years, the same as defendant in this case.

Q. When was that?

A. I believe it was shortly after '34.

Q. Well, that is when you appointed him as an agent? A. Yes, sir.

Q. Now, he was already in business under that name National Van Lines at the time you appointed him, was he not?

A. To the best of my recollection, his name was not National Van Lines at the time he first started as an agent. He had the name "National" and I

(Testimony of Frank L. McKee.)

don't know whether it was "Transfer" or some other name in joint use.

Q. Are you sure of that?

A. That is as far as I can recall. I also checked that with my father, and that is to the best of his recollection, also.

Q. Now, isn't it true that the plaintiff National Van Lines, Inc. uses the name "National" in its name to denote that the business is of a national scope?

A. The name "National" does suggest national scope.

Q. And you doing a national business, you use it to [129] show you are doing a national business, do you not?

A. I do not know what Mr. McKee, Sr. had in mind at the time he picked the name National Shippers and Movers. I like the name and that is the reason I am fighting for it.

Q. Do you recall giving your deposition in this case July 22, 1954? A. Yes, sir.

Q. I show you your testimony on page 38 of that deposition, and I will read:

"Q. Do you think the word has some connotation that you are able to go everywhere and deliver goods on a national scale?

"A. Yes; this gives it a far more descriptive name than 'Allied.' That just means a grouping of van lines, but National Van Lines means national in scope."

Did you give that answer to that question?

(Testimony of Frank L. McKee.)

A. Yes, sir.

Q. Now, the shield which the plaintiff uses, you know, do you not, that that is an official seal of the United States?

A. I don't think it is the official seal.

Q. You think it differs materially from the official seal? A. Yes. [130]

Q. Do you think it differs materially from the Olympic, U. S. Olympic team's symbol?

A. Yes, sir.

Q. You don't think they would be confused?

A. The perpendicular stripes might be confusing, if the Olympic shield were used by another mover.

Q. I am asking you, do you consider your shield to be different from the shield which is the official shield of the United States?

A. Do I believe it to be different?

Q. Yes.

A. Well, I know one shield from another. I would say they are different.

Q. You would be able to distinguish them?

A. I personally would, because I designed the National Van Lines shield.

Q. Would you expect the public to distinguish them?

A. I think the public would be confused with any perpendicular stripes, just as Russ Minear, when he saw the stripes on Al Dean's warehouse at San Diego, at a glance he thought it was National Van Lines.

(Testimony of Frank L. McKee.)

Q. Well, it isn't your thought that anyone seeing the vertical stripes on your van would think it was the Olmpic symbol?

A. There is a possibility, but I don't know what business [131] would go to the other side.

Q. Well, don't you know that many concerns who have supplied foodstuffs and the like to the Olympic teams have, to advertise that fact, placed the shield on their trucks?

A. I am not worried about foodstuffs.

Mr. Groen: The court please, I have been trying to refrain from objections along this line. I don't think it makes any difference if the shield is identical. We are talking about something we are using in this industry as a mark of identification. Anything beyond this industry has no bearing in this case.

The Court: Are you conceding it has a secondary meaning?

Mr. Groen: For the moving of furniture and storage I certainly do. I think the record will show it.

I can take that emblem off the wall and take it identically and use it as a trade-mark for Mr. McKee's van lines. That has nothing to do with the fact we took it off the wall.

We don't care what is going on in the Olympics or the food line or any other line, except moving and storage.

For that reason I object to any further cross-examination along this line.

(Testimony of Frank L. McKee.)

The Court: I think he is attacking the trade-marks as registered trade-marks, rather than attempting defense to the improper competition feature of your case. [132]

Mr. Groen: But my point, your Honor, is you can register as a trade-mark anything that you might have lifted out of the public domain, as long as you don't keep it with the same material that you lifted it from, or, say, the same business or service.

I can take the stripes in the flag or shield or emblem and use them some place they have never been used before. I can register it as a perfectly good mark.

The Court: You can't use the Flag of the United States as a trade-mark.

Mr. Groen: No, specifically not.

The Court: Or the Seal of the United States.

Mr. Groen: That wasn't done here. My point is I can take any kind of an emblem I might find in use in a display and make a trade-mark out of it in any particular line, if it isn't anticipated for that line. That is why I think the line of testimony is entirely irrelevant and immaterial and far beyond the scope of the direct.

We don't deny there is an Olympic shield. There are other stripes in other things. I will stipulate that that has no bearing on this case.

Mr. Mason: It goes further than that, claiming the barber pole effect on the map of the United

(Testimony of Frank L. McKee.)

States, used by the defendant, is confusingly similar to the shield used by the plaintiff. [133]

The plaintiff stated his shield differs from the official shield of the United States, from the official shield of the United States Olympic team, which I will bring out.

The Court: Is there a pending question?

Mr. Mason: I don't believe there is.

The Court: I don't recall one. It seems to me we had an objection to the line of testimony. Objections have to be placed to specific questions.

Q. By Mr. Mason: Isn't it true that the plaintiff uses this shield to give a patriotic flavor to its business?

A. No, not patriotic. That wasn't the thought in mind.

Q. You do not use it to show that your concern is a United States concern?

The Court: So far as plaintiff's motives are concerned, I don't think they are particularly important. It is the result.

The motive of the defendant might be important as bearing upon damages. But motives of a plaintiff are only important if they bring about a result, if we measure the result, the thing that has happened, rather than the reason why it was done.

I think a firm can even inadvertently, without purposeful design, acquire a trade-mark. Not a registered one, [134] certainly, but one the law will recognize.

Mr. Mason: He can unless he is using it for a

(Testimony of Frank L. McKee.)

descriptive purpose. That was the purpose of my question.

Anyone would be entitled to give a patriotic flavor to their business by using the national colors is the point I was making. I might say it is equivalent to saying it is made in the United States of America.

Q. By Mr. Mason: Now, is it your statement that plaintiff was the first transfer and storage company to use a patriotic shield of that kind on its vans? A. The first company?

Q. Yes.

A. No. The first shield we placed on the truck was placed on a green-painted truck and the shield was an outline in gold. There was no color in the beginning.

Q. Well, it is your statement then the plaintiff was the first concern in the moving and storage business to place on its trucks and stationery a shield shaped like your shield and having alternate vertical red and white stripes?

A. The first to my knowledge to have vertical red and white stripes, in our industry.

Q. Aren't you aware of the fact that the Pihl Transfer and Storage Company in Portland, Oregon, and operating in the Northwest, has used a shield like yours on its trucks for many years?

Mr. Fihe: Maybe we had better spell that name.

Mr. Mason: P-i-h-l.

The Witness: That is something that developed just recently, and it has been brought to my attention they did have such a shield. That here again

(Testimony of Frank L. McKee.)

was a small mover operating between two States, that did have something on that order.

Q. By Mr. Mason: It is true, is it not, that that company used the shield before the plaintiff did?

A. I don't know what is true. I was not present when the deposition was taken and I have not as yet read the deposition.

Q. You do know, do you not, that for many years many concerns have used the word "National" in a transfer and storage business as a prefix to their names?

Mr. Groen: May I ask that question be specified? It is freight or general moving or——

Mr. Mason: I said in moving and storage.

Mr. Groen: Furniture moving and storage?

Mr. Mason: Yes.

The Witness: I don't recall anyone in the moving and storage business that had the name "National" prior to National Van Lines, outside of some local mover you may have disclosed.

Q. By Mr. Mason: And in that answer are you including [136] National Van Lines of Milwaukee?

A. I have already testified to National Van Lines of Milwaukee. He adopted that name after National Van Lines, Inc. of Chicago.

Q. Don't you know that other concerns in the United States in the storage and transfer business are using patriotic shields having vertical red and white stripes on their equipment?

A. Who, for instance? I don't know of anyone.

(Testimony of Frank L. McKee.)

Q. You don't know of anyone. Now, I refer you to Exhibit 18, which is one of the exhibits you placed in evidence yesterday, being the classified section of the current August 1954 Los Angeles telephone directory.

Looking at page 1049, did you observe that the All-American Van & Storage Co. is using a shield?

A. Yes, sir. I don't know when they started using it, and I have action in mind to be taken against that company.

Mr. Mason: I move the latter part of the answer be stricken as not responsive.

The Court: Well, the whole inquiry is probably a field that is not at issue. I will let the whole answer stand.

Q. By Mr. Mason: I call your attention to page 1063, the Atlantic Transfer Company, which uses the Union Pacific shield. Isn't that true? [137]

A. They are also showing the Santa Fe and Southern Pacific emblems along with it. I don't know what their purpose is.

Q. But it does show the Union Pacific shield.

A. They are showing it in the ad.

Q. Have you examined this classified directory?

A. Well, I just went through it quickly. I haven't given it much of an examination.

Q. You don't know what other national companies in the moving and storage business are included in it?

A. I didn't look through that new directory for that purpose.

(Testimony of Frank L. McKee.)

Q. You do find various concerns in that using a map of the United States on its trucks, do you not?

A. The outline of a map, yes; not on the trucks, I don't think.

Q. I believe I asked you if plaintiff did any hauling strictly within the State of California. You testified it was a very small proportion, is that correct?

A. It is a small amount. I don't know what amount.

Q. Now, coming down to this agreement, sales agreement you had with Mr. Dean, that was a standard form of sales agency agreement which the plaintiff uses, was it not?

A. Yes, sir, at that time.

Q. And it was prepared by your company or its attorneys? [138]

A. Well, I prepared it myself. It was not by an attorney.

Q. It was filled out by you or your company and forwarded to Mr. Dean for his signature, was it not?

A. Yes, sir, although I would not be sure one of our Los Angeles men did not take it to him for signature.

Q. He has nothing to do with the phraseology used in that agreement, did he?

A. No, that was my own.

Q. And you signed the contract on behalf of plaintiff? A. Yes, sir.

Q. Then you knew when you signed that con-

(Testimony of Frank L. McKee.)

tract the name under which he was operating, did you not? A. Yes, sir.

Q. And at that time it was the National Van & Storage Co., was it not?

A. Yes, sir.

Q. Now, you knew, did you not, that apart from the work which Mr. Dean was going to do for the plaintiff, in the booking of interstate shipments, he was going to operate his own business, did you not?

A. Yes, sir.

Q. And you knew that throughout the period of your contract? [139]

A. Yes, sir. I might suggest that Al Dean had a very small business at that time. And we, by consent, agreed that his use of the name was all right.

Q. You did not express any complaint to his use of the name, did you?

A. Not at that time, no, sir.

Q. And you knew he was increasing his business as the years went on, did you not?

A. In later years we recognized that fact.

Q. And you knew, did you not, that within less than a month after signing the contract, that Mr. Dean, of his own volition, changed the name of his company from National Van & Storage to the National Transfer & Storage, so as to eliminate the word "Van", isn't that correct?

A. I knew he changed it, yes, sir.

Q. You didn't request him to do that, did you?

A. No, I didn't.

(Testimony of Frank L. McKee.)

Q. Now, didn't he advise you at that time he had made the change?

A. I don't know what he did at that time; 20 years ago.

Q. Just how did Mr. Dean operate as your sales agent? A. Or ten years ago; ten years ago.

Q. I didn't understand.

A. Ten years ago. [140]

Q. I say, just how did he operate? I want to know just what he did.

A. Well, he was a small transfer concern that was starting up. He had a few pieces of—I don't know how many pieces he had when he started. All I know is that Dad at one time loaned him $300.00 so he could get his license to come from Beverly Hills into Los Angeles; he was that small. And he was no worry to us, competitively speaking. As a matter of fact, he was our agent and everything was lovely.

Q. You haven't answered my question. I asked what he did as your agent.

A. As our agent he booked shipments in the name of National Van Lines and turned the bookings over to us for service.

Q. He just booked the interstate shipments?

A. He booked interstate shipments and took care of the packing.

Q. And you would supply your trucks to——

A. We would perform the service.

Q. In booking those shipments, you supplied

(Testimony of Frank L. McKee.)

him stationery to fill out, to cover the bill of lading or whatever it was?

A. We would supply orders for service, yes.

Q. He didn't use his own stationery, National Transfer & [141] Storage Co.?

A. I don't know what the storage was. We didn't suppply stationery at that time.

Q. What did you supply?

A. Supplied orders for service he could use in the procurement of business for National Van Lines.

Q. While he was booking those interstate shipments you knew he was carrying on his own business apart from that?

A. Whatever it was, yes, sir.

Q. All your sales agents operate that way, do they not?

A. They carry on their own local business, yes, sir.

Q. During the period of his contract with you, isn't it true there were frequent exchanges of correspondence between you and Mr. Dean?

A. Yes, sir.

Q. And he used his own stationery, did he not?

A. Yes.

Q. So you saw the stationery he was using?

A. Yes, sir.

Q. You knew throughout that time that Mr. Dean was building up a valuable business and good will under the name he was using, did you not?

(Testimony of Frank L. McKee.)

A. I knew he was building up for National in San Diego, as our agent. [142]

Q. You knew he was building up his own business, did you not?

A. I knew what he was building up for us.

Q. You didn't know what he was doing——

A. I didn't know what he was doing for himself.

Q. You knew he was carrying on his own business. A. I knew he was carrying on for us.

Q. You testified, I believe, that Mr. Dean canceled the contract. A. Yes.

Q. You testified that he canceled it because he wanted to receive his commissions more promptly, is that right?

A. That is my understanding, yes.

Q. Isn't it true he canceled because of a dispute as to some territorial area up around the Bay Area?

A. Well, I think you are right. That came into it, too. Al Dean wanted everything he could get.

Mr. Mason: I move to strike the last sentence, your Honor.

The Court: Does it make any difference why it was canceled? We have a written instrument here which contains a covenant, does it not, not to use the trade name?

Mr. Mason: It has a specific combination of words you are not supposed to use.

The Court: What is the relevancy of why——

Mr. Mason: Well, your Honor, he had given——

(Testimony of Frank L. McKee.)

The Court: ——the original contract was canceled?

Mr. Mason: He had given an answer in his direct testimony, which, according to Mr. Dean, wasn't correct. I want to establish that.

The Court: Now you are moving to strike part of the last answer?

Mr. Mason: Well, he made the statement that he was trying to get all he could get.

The Court: All right. That part will go out.

Q. By Mr. Mason: And up to the time of the cancellation of this contract plaintiff had never complained about Mr. Dean's use of the name "National Transfer & Storage Co."?

A. As long as he was working——

Q. Or about his use of the map?

A. We have ten years of time here that we are talking about. And I don't know what period you are in.

Q. He canceled the contract in 1950, February, isn't that true? A. Yes.

Q. It was signed November 7, 1944.

A. Yes, sir.

Q. During that time the plaintiff did not make any complaint to Mr. Dean about his use of the name "National Transfer & Storage" or the map.

A. According to Mr. Dean's testimony, he didn't have the map during '44 and '50.

Q. Well, did you make any claim to him about the name?

A. As long as the name was working for our benefit we had no complaint.

(Testimony of Frank L. McKee.)

Q. Will you answer the question? Did you or did you not make any complaint to Mr. Dean during the duration of that contract about his use of the name "National Transfer & Storage Co."?

A. I don't believe I did.

Q. In fact, you didn't make any complaint about his use of the name or the map until November 9, 1951, almost two years after the contract was canceled, isn't that correct?

A. Are you talking about written complaint?

Q. Any kind of complaint.

A. I believe I talked to Mr. Dean over the phone on settlement matters and the question came up.

Q. When was this?

A. It would be not too long after cancellation; I don't recall. I am not too clear on that.

Q. You don't know definitely whether anything was said about it or not, is that correct?

A. Yes, I believe I did say something. I have forgotten what the conversation was, truthfully.

Q. Now, you testified, I believe, that by virtue of the contract you licensed Mr. Dean to use the word "National", is that correct?

A. By virtue of the contract we permitted him to use the name "National", that is right.

Q. In soliciting business for you?

A. That is right.

Q. The contract didn't say anything about Mr. Dean's own separate business, did it?

A. I don't think so, no, sir.

Q. It didn't relate to that?

(Testimony of Frank L. McKee.)

A. No, sir, nothing in the contract.

Q. You had no discussions with Mr. Dean prior to the signing of the contract about the contract, did you? I am speaking of you personally.

A. No, I don't think so.

Q. You testified, I believe, yesterday that plaintiff uses the shield on all its stationery.

A. Yes, sir.

Q. I show you Exhibit 37. That is your stationery, is it not?

A. That is a tissue copy, is it not, carbon copy?

Q. This is not your file copy, is it?

A. This is a file copy, yes, sir.

Q. What do you use that copy for, to send it out to [146] people?

A. Carbon copies would go to other offices of ours, or for filing purposes.

Q. You do not use the shield on those?

A. Not on the carbon copies, no, sir. The best of my recollection, that is the only exception.

Q. Didn't you or your company start a company up around Sacramento within the last year, or such a matter, under the name of National Transfer & Storage Co.?

A. Yes, sir. Our company didn't start it.

Q. You say your company did start it?

A. No, our company didn't start it.

Q. Who started it? A. My brother.

Q. Is he a part of the plaintiff corporation?

A. No, sir.

(Testimony of Frank L. McKee.)

Q. Did the plaintiff corporation give him a license to use that name?

A. There is no license.

Q. Did it give him any license to use the name?

A. We didn't object to his use of it.

Q. But that was a separate company from the plaintiff? A. Yes, sir.

Q. Is that still in business?

A. Yes, sir. He is also an agent for National Van [147] Lines.

Q. Now, going back for a moment to your father's business, National Shippers and Movers, isn't it true that he did most of that interstate shipment by rail?

A. No. He did some pool car work along with the van movement. I don't know what percentage.

Q. That was pool care movement, like the National Carloading carries on?

A. No. His pool car work was padded van service, padded in the freight car.

Q. Isn't that what the National Carloading Company does, carry on a pool car shipment?

A. Their pool car business was the loading of freight cars with crated furniture, and Mr. McKee did not use crates.

Q. With the exception of the crates, it was the same type of business, was it not?

A. It was pool car, yes, sir.

Q. And the National Carloading Company used trucks, too, did it not? A. No, sir.

(Testimony of Frank L. McKee.)

Q. Didn't they use them to haul to the freight cars?

A. I don't think they had any vans or trucks hauling to the freight cars. I think all their business was brought to them by small movers and warehouses.

Q. Exhibit 34, you have a list of advertising costs [148] per year. Do you know what is included in that figure, the figures given there?

A. All forms of advertising.

Q. Well, for instance what?

A. Telephone directories, newspaper, radio, television, direct mail costs, anything of that nature.

Q. That includes all the advertising you did?

A. Not all advertising done to promote National Van Lines. As the exhibit states, it does not include the money spent by agents, some two hundred agents.

Q. You don't know what they spent?

A. No, but I would say they spent in the aggregate about as much.

Q. That is purely a guess on your part, isn't it?

A. Yes, but it is a good guess.

The Court: What is the difference between a guess and a good guess?

The Witness: I have looked into my guess as far as I could.

The Court: It means it is an estimate?

The Witness: "Estimate" might be a better word, yes.

Q. By Mr. Mason: Now, you testified, I believe,

(Testimony of Frank L. McKee.)

that you only had the two trade-marks, the registrations of which you have placed in evidence?

A. No, there are three altogether. The white field [149] is also registered.

Q. You do have this white field in which you display your name "National Van Lines"?

A. Yes.

Q. It is registered as a trade-mark?

A. I didn't mean to convey there were only two, if I did.

Q. You are referring to Exhibit 19, you have a list of magazines and newspapers in which you advertised in 1942. Do you have any similar lists prior to that time?

A. No, not here.

Q. In making up this list you did not personally make any detailed comparison of this with your former years? A. No, sir.

Q. Referring to Plaintiff's Exhibit 20, when was that first put out?

A. That particular piece came out in October.

Q. This year? A. Yes, sir.

Q. October of 1954. A. Yes, sir.

Q. I show you Exhibit 21 and will ask you to state when you first placed that advertising matter out.

A. That first came out in October, also.

Q. Of this year? [150] A. Yes.

Q. I show you Plaintiff's Exhibit 22, and I will ask you when you first placed this out.

A. The same time.

(Testimony of Frank L. McKee.)

Q. Same as Exhibit 20?

A. There is a date on there.

Q. Exhibit 22 was put out in July of '54. That is the date appearing. A. Yes.

Q. What about Exhibit 24?

A. That piece, I believe, came out about a month earlier, September.

Q. '54? A. Yes, sir.

Mr. Von Herzen: What exhibit number?

Mr. Mason: 24.

Mr. Von Herzen: Thank you.

Q. By Mr. Mason: What about this, do you know when this exhibit came out?

A. No, I don't know what date that was, but that, I would say, is the early part of this year, I believe.

Q. That is Exhibit 25?

A. Yes, sir.

Q. Now, what about 26?

A. That also came out in October. [151]

Q. Of this year? A. Yes, sir.

Q. Now, what about Exhibit 27?

A. Those cuts have been in existence for the last three or four years.

Q. That is merely a reproduction of a cut you had for the purpose that you used in advertising, is that correct?

A. Yes, sir. That is the style of ad used by agents through our recommendation.

Q. That is Exhibit 27. Now, I show you Exhibit 28, which appears to be a map for the year—I

(Testimony of Frank L. McKee.)

mean a calendar for the year 1955. I assume that was just put out?

A. That is recent, too. That is about, I think that that came out about the same time as the other.

Q. I show you Exhibit——

A. Pardon me a minute. This was November.

The Court: Of this year?

The Witness: No, it would be October. I am right, October.

Q. By Mr. Mason: Exhibit 28 was put out in October of this year? A. Right.

Q. Now, this photograph of Exhibit 29, when was that taken? That shows on here, June 1954; is that correct?

A. No, that is when—— [152]

The Court: This action was filed November 26, 1952. All of these exhibits showing use of name subsequent to that seems to me to be rather beside the point.

Mr. Groen: They are submitted, your Honor, to show how much the trade-mark has been used and is in use, and this was submitted as a current cross section of advertising.

The Court: Do you have a cross section of advertising as it was in existence at the time of filing the lawsuit, or prior to that time?

Mr. Groen: This other pamphlet, which is introduced as Exhibit 27, shows a rather large collection of material of earlier dates, the exact dates. Its caption is, "Advertising Sales Promotion 1953", and

(Testimony of Frank L. McKee.)

I think the witness testified that some of that has been in existence for a considerable period.

Q. By Mr. Mason: Now, referring to the Exhibit 27, the blotter, which is the first item in this folder, when was that first put out?

A. I have forgotten the date, but it would be early in '53.

Q. And when was it circulated?

A. At that time, when we first got it.

Q. To whom did you circulate it?

A. To agents and to the trade.

Q. Now, you have in this same Exhibit 27 a brochure, [153] which at the top says, "A Complete 48-State Long Distance Moving Service." When was that first published?

A. That was a reissue of a former estimate sheet that had been used two years previous.

Q. What were the two years previous?

A. This is '53. That would be '52 and '51, part of '51; I don't know how much.

Q. That was when your representatives went out to solicit their business and they made a proposal on this form?

A. And left that with the shipper, that is right?

The Court: I don't think any of these things which were first used after the controversy started are of any use to us. Those which were used beforehand, of course, are highly relevant material, but I don't think you can establish your right after you have filed your complaint.

Mr. Groen: Except insofar as, I believe, it shows

(Testimony of Frank L. McKee.)

this is typical of the type of advertising carried on constantly. It is always hard to bring in material very old in volume.

This was picked up as current material, and the item, in advertising experience, shows expense over the——

Mr. Mason: That was one of the reasons I was going over this. You asked if this was typical. You didn't say typical of what. I wanted to clear that up.

Q. By Mr. Mason: As I understand your testimony, this was all put out this year or some of it last year? [154]

A. A good deal of it was. This piece here is at least four years old.

Q. You are referring to——

A. "Helpful Hints". This is six or seven years old.

Mr. Groen: Referring to the postcard?

The Witness: Postal card.

Q. By Mr. Mason: You say it was distributed in 1953.

A. This just shows what was done in '53. But that is an old postal card. You can even see the make of the truck as an old truck.

Q. Do you know when you first put that card out?

A. I have forgotten the first purchase, but there have been many reruns of it.

Q. We have a brochure here. When was that first put out?

A. That would be the early part of '51; might

(Testimony of Frank L. McKee.)

have been '50. We had the Cane Advertising Agency in Bloomington. They got that one out.

Q. Are you guessing on it or do you know?

A. No. That is about the time. You are right. I don't know the date.

Mr. Von Herzen: I didn't get the name of the advertising agency.

The Witness: Cane.

Mr. Von Herzen: How do you spell it? [155]

The Witness: C-a-n-e.

Q. By Mr. Mason: This brochure, "Pioneer's Progress", when was that first published?

A. "Pioneer's Progress", well, that would be at least five years old.

Q. This piece of National Van Lines, Inc., it has a note, "20,000 folders distributed in '53."

A. Yes.

Q. To whom were those folders distributed?

A. To agents and to national accounts.

The Court: Let's not inquire into things subsequent to the filing of the lawsuit, except as the inquiry might go to show it is an exemplar of something distributed earlier. I am not interested in anything distributed after the filing of the lawsuit.

Mr. Groen: This has a '52 date on it.

Mr. Mason: It may be the date it was printed. These all bear dates in '53.

The Court: If they were distributed before the suit was commenced, or these examples are of something that was distributed earlier, all right. But I am not going to base any decision here upon

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(Testimony of Frank L. McKee.)

literature which has been flooded in the market after the dispute arose.

We will take our recess until 1:30.

(Whereupon, at 12:10 o'clock p.m., a recess was taken until 1:30 o'clock p.m. of the same day.) [156]

FRANK L. McKEE

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Mason: I have no further questions.

Mr. Groen: Just a few more questions on redirect.

Redirect Examination

By Mr. Groen:

Q. Mr. McKee, prior to your coming to Chicago with National Van Lines, Inc., that is, prior to 1934, were you employed by National Shippers and Movers? A. Yes, sir.

Q. Where?

A. I was first employed by National Shippers and Movers in Chicago, and then transferred to Los Angeles, and then back to Chicago.

Q. When were you in Los Angeles, what period?

A. Transferred in '31.

Q. You were working for your father from then on for National Shippers and Movers?

A. Yes, sir.

Q. May I refer you again to Plaintiff's Exhibit 8, which shows the truck for National Shippers

(Testimony of Frank L. McKee.)

and Movers. Do [157] you see the stripe design on that? A. Yes, sir.

Q. What was the origin of that stripe design?

A. That design was made up by me.

Q. What year? A. In 1931.

Q. And what about this truck, is this part of the equipment that originally was with National Shippers and Movers?

A. Yes, that truck made regular runs to the West Coast.

Q. And that was prior to 1934?

A. Yes, sir.

Q. Did that truck with the emblem—was that transferred to National Van Lines, Inc., to your knowledge?

Mr. Mason: I object to that as calling for a conclusion and not the best evidence.

Q. By Mr. Groen: Have you any knowledge as to whether that truck was transferred?

A. Yes, I know that truck was transferred.

Q. Is it in service today?

A. Yes, that same truck has been rebuilt and is still in service; that same body.

Q. Where is it located?

A. In Chicago. [158]

Q. With reference to your advertising and particularly the brochure that we paged through on cross examination, that is, Plaintiff's Exhibit 17, you testified as to certain dates of some of this material. A. Yes.

(Testimony of Frank L. McKee.)

Q. Some was very current, after the filing of this suit—— A. Yes.

Q. ——and some was prior. A. Yes.

Q. Your advertising prior to 1954 and '53 was not as heavy as it is today?

A. That is true.

Q. Is this advertising material in general the type you used the years previous or not?

A. About that type, yes, sir.

Q. But you did not advertise as heavily as you started? A. No, we didn't.

Q. What is the reason for increasing your tempo in advertising?

A. Well, all national lines have increased their amount of advertising, and it is necessary in order to get the business.

Q. Have your other competitors been doing the same thing, to your knowledge? [159]

A. Yes, sir.

Mr. Groen: That is all.

Recross Examination

By Mr. Mason:

Q. Mr. McKee, this Exhibit 8, when did you say this picture was taken?

A. I believe that picture was taken in '32.

Q. How do you know?

A. I believe the license plate on it is '32.

Q. Can you see the license plate on this (indicating)?

A. No; you have to use a magnifying glass.

(Testimony of Frank L. McKee.)

The Court: We have one. Where is it?

Q. By Mr. Mason: Have you ever examined this with a magnifying glass?

A. Yes, I did one time and I believe the date, as I recall it, is '32.

The Court: You now have a glass. Will you point it out to Mr. Mason?

The Witness: It may be difficult to see on this, because it is a photostat, but the original was easier to see. You can't make it out, can you?

Mr. Mason: No, you can't. No further questions.

Redirect Examination

By Mr. Groen:

Q. Do you have the original photograph this is a [160] print from?

A. Somewhere, yes.

Mr. Groen: May we ask leave to file that later as a supplement to this exhibit?

The Court: The evidence ought to be brought here to the trial. We have his testimony when he examined the original in 1932——

The Witness: '32.

The Court: ——he observed, but he simply cannot make that out from the photostat which is here today.

Mr. Groen: Yes.

The Court: Unless his testimony that it was a 1932 truck is impeached.

Mr. Groen: That is all, Mr. McKee.

(Witness excused.)

Mr. Groen: At this time I would like to offer as Plaintiff's Exhibit No. 47 this chart, which is really an enlargement of the others we have been referring to, and I think it should stay with the record.

It is a reproduction of Plaintiff's Exhibits 4 and 15.

The Court: All right.

(The chart referred to was marked Plaintiff's Exhibit 47 and was received in evidence.)

Mr. Mason: You are just offering it as illustrative?

Mr. Groen: Yes. Then Mr. White has kindly called my [161] attention to the fact we overlooked offering Exhibits 3-A and 4-A, which are the certified copies of the trade-mark registration, going with Exhibits 3 and 4, and Exhibit 7-C.

Mr. Fihe: The defendant's latest letterhead.

Mr. Groen: The defendant's latest letterhead.

Mr. Fihe: And Exhibit 17.

Mr. Groen: Which is the booklet of advertising we discussed.

I now offer Exhibits 3-A, 4-A, 7-C, and 17.

Mr. Mason: No objection.

The Court: Received.

(The documents heretofore marked Plaintiff's Exhibits 7-C and 17 were received in evidence.)

Mr. Groen: Then, if your Honor please, I offer in evidence the deposition of Marie Martin taken San Francisco, June 12, 1954, as to confusion, and

the deposition of Robert W. Adams, taken June 12, 1954, on the same subject matter;

John G. Morgan, taken in Chicago on the 2nd of September, 1954, and Harold T. Moss, same date, same place;

Joseph S. Ross, same date, same place; Frank L. Ritzmann, same date and same place.

Then I offer the discovery deposition of Alfred Edward Dean, the defendant.

The Court: Before we get to the discovery one, the ones you have offered are received. [162] I haven't heard any objection. I take it there is none.

Mr. Mason: No objection, your Honor.

The Court: All right.

(The documents referred to were marked Plaintiff's Exhibits 48 to 53, inclusive, and were received in evidence.)

[Exhibits 48, 49, 50, 51, 52 are set out at pages 265-403.]

Mr. Groen: May I say this: I had in mind placing Mr. Dean on the stand for a few moments, to summarize some of the material, that is, what we consider kernels among the chaff, which is always true among discoveries.

I understand we are going to brief this material, anyway. I think I can offer this deposition and summarize it in my brief, and we won't have to examine Mr. Dean, except I have one or two questions I can catch on cross examination, as I understand he is taking the stand.

The Court: So you are now offering the deposition?

Mr. Groen: Yes.

The Court: Admitted.

(The document referred to was marked Plaintiff's Exhibit 54 and was received in evidence.)

[Exhibit 54 is set out at pages 403-441.]

Mr. Groen: With that, plaintiff rests.

Mr. Mason: Were there some exhibits attached to this deposition?

Mr. Groen: I assume there are exhibits with several of the depositions.

The Court: Exhibits to a deposition are considered a [163] part of the deposition.

Mr. Groen: That is what I assumed. If there is any question, I am offering the exhibits, also. to this deposition?

* * * * * [164]

Mr. Mason: By stipulation between plaintiff's counsel and the defendant's counsel, it has been agreed, in lieu of placing in evidence, some 624 trade-mark registrations including the word "National", that I can place in evidence a letter from my Washington associate stating the results of his search, and the letter may be accepted for what it states. Is that correct?

Mr. Groen: That is correct, except I reserve my objection, of course, on relevancy and competency. There is no dispute in my mind they can find those registrations and bring them in. I think they are irrelevant to the case.

The Court: It will be received.

The Clerk: It will be Defendant's C in evidence.

(The document referred to was marked Defendant's Exhibit C and was received in evidence. [169]

Mr. Mason: I have here a group of photostatic copies of telephone directories, as follows:

May 1954 of Milwaukee, Wisconsin. I think we might place them in as a group.

September 1954 issue of the Portland, Oregon, telephone directory;

The June 1954 issue of the Chicago telephone directory;

The May 1954 issue of the Philadelphia, Pennsylvania, directory;

September 1954 issue of the Washington, D.C., telephone directory;

The July 1954 issue of the San Francisco telephone directory;

The Seattle phone directory for March 1954;

San Diego directory, telephone directory of January 24, 1954;

And the 1954-55 issue of the Manhattan, New York City, telephone directory.

Those only contain the listing of concerns having the name "National" as a prefix. I offer those, pursuant to stipulation, as a group.

Mr. Groen: Same objections. Otherwise, stipulated.

The Court: Same ruling. I don't know to what extent they are relevant. We will sort it out during the period of submission. [170]

Mr. Groen: I think that is right.

The Clerk: Defendant's D in evidence.

(The documents referred to were marked Defendant's Exhibit D and were received in evidence.)

Mr. Mason: I will offer as the next exhibit the deposition of Mr. Abraham Mechanic, taken in Milwaukee on December 8, 1954.

Mr. Groen: That deposition, of course, is subject to the objections stated at the time the deposition was taken. We again say it is irrelevant.

The Court: Yes. It will be received, but I will consider the objections when reading the deposition.

The Clerk: Is this received as an exhibit, your Honor?

The Court: Yes.

The Clerk: Defendant's E in evidence.

(The document referred to was marked Defendant's Exhibit E and was received in evidence.)

[See pages 442-444.]

Mr. Mason: In conjunction with that, I would like to offer certified copies of some papers from the Interstate Commerce Commission showing the interstate licensing of that company and the proceedings leading up to the granting of the license.

Mr. Groen: No objection, except to relevancy, again.

The Court: Received. And the question of relevancy will be considered in connection with the exhibit. [171]

The Clerk: Defendant's F in evidence.

(The documents referred to were marked Defendant's Exhibit F and were received in evidence.)

Mr. Mason: The next exhibit I would like to offer is papers certified by the Secretary of the Public Service Commission of Wisconsin relating to the hearing on April 27, 1949, relating to the transfer of the license of Abraham and Lillian Mechanic as co-partners in the corporation, doing business as National Van Lines.

Mr. Groen: The objection is relevancy.

The Court: Received.

The Clerk: Defendant's G in evidence.

(The documents referred to were marked Defendant's Exhibit G and were received in evidence.)

Mr. Mason: I have as the next exhibit that I would like to offer a certificate from the Secretary of State of the State of Washington, showing that the National Transfer, Inc., a Washington corporation, was incorporated in that State on April 1, '47, and is still in good standing on the corporate records.

The Court: Received.

(The document referred to was marked Defendant's Exhibit H and was received in evidence.)

Mr. Groen: It isn't necessary for me to make the same objection on relevancy? It will run to all of these? [172]

The Court: Yes. I think there is some doubt as to what the relevancy is. I am going to resolve that after I have an opportunity to read your briefs.

Mr. Groen: My point is I don't have to repeat it, it goes as to all of these?

The Court: That is right.

Mr. Mason: It is agreeable to me you have a standing objection.

Mr. Groen: Fine.

Mr. Mason: The next is a certificate of the Secretary of State of the State of Connecticut, showing that the National Transportation Company was incorporated in that State on October 6, 1920, and is still in good standing on its records.

The Court: Same ruling, same understanding.

(The document referred to was marked Defendant's Exhibit I and was received in evidence.)

The Clerk: Defendant's I in evidence.

Mr. Mason: The next is a certificate of the Secretary of State of the State of New York, showing that the National Moving and Warehouse Corporation was incorporated in that State on June 9, 1941, under the name of National Warehouse & Van Co., Inc., and that according to the records the corporation is still a subsisting corporation.

The Court: Received. [173]

The Clerk: Defendant's J in evidence.

(The document referred to was marked Defendant's Exhibit J and was received in evidence.)

Mr. Mason: The next exhibit is a certificate of the State Secretary of the State of New York,

showing that the National Carloading Corporation was qualified in that State in January 1932, and is still authorized to do business in that State.

The Court: Received.

The Clerk: Defendant's K in evidence.

(The document referred to was marked Defendant's Exhibit K and was received in evidence.)

Mr. Mason: The next is a certificate of the Secretary of State of the State of Oklahoma, showing that the National Trailer Convoy, Inc., is incorporated in that State and is in good standing.

The Court: Received.

The Clerk: Defendant's L in evidence.

(The document referred to was marked Defendant's Exhibit L and was received in evidence.)

Mr. Mason: The next is a certificate of the Secretary of State of the State of New Jersey, showing that National Movers, Inc. was incorporated in that State on March 13, 1948, and is still doing business, qualified to do business.

The Court: Received.

The Clerk: Defendant's Exhibit M in evidence.

(The document referred to was marked Defendant's Exhibit M and was received in evidence.)

Mr. Mason: The next is a certificate of the Secretary of State of the State of Illinois, showing that the National Cartage Co. was incorporated in that State on November 2, 1946, and is still qualified to do business.

The Court: That will be received. Now, there are various degrees of remoteness that are coming

into these, but I will consider all of them, understanding objection to my considering any of them.

Mr. Groen: Very well, your Honor.

The Clerk: Defendant's N in evidence.

(The document referred to was marked Defendant's Exhibit N and was received in evidence.)

Mr. Mason: The next is a certificate of the Secretary of State of the State of New Jersey, showing that the National Freight, Inc. was incorporated in that State in August 1944, and is still an existing corporation.

The Court: Received.

The Clerk: Defendant's O in evidence.

(The document referred to was marked Defendant's Exhibit O and was received in evidence.)

Mr. Mason: The next is a certificate of the Secretary of State of the State of Florida, showing that the National Trucking Company was incorporated in that State on May 30, [175] 1931.

The Court: Received.

The Clerk: Defendant's P in evidence.

(The document referred to was marked Defendant's Exhibit P and was received in evidence.)

Mr. Mason: The next is a certificate of the Secretary of State of the State of Illinois, showing that the National Freight Lines, Inc. was incorporated in that State in February 1938, and is still a subsisting corporation.

The Court: Received.

The Clerk: Defendant's Q in evidence.

(The document referred to was marked Defendant's Exhibit Q was was received in evidence.)

Mr. Mason: Now, the next exhibit will be a volume of some 170 registrations of trade-marks, including the shield with the vertical stripes as a part thereof. These are the soft copies of the registrations.

The Court: Received.

The Clerk: Defendant's R in evidence.

(The documents referred to were marked Defendant's Exhibit R and were received in evidence.)

Mr. Mason: The next I would like to introduce is the deposition of Mr. Pihl.

Mr. Groen: Subject to the objections of record in the deposition, as to relevancy and competency.

The Court: Yes. Some parts of it might be relevant and some parts might not be. We will consider all those when I read your briefs. You can point out particular questions when you brief the case.

Mr. Mason: I would like to offer this together with the exhibits attached to it.

The Court: Received.

The Clerk: Defendant's S in evidence.

(The document referred to was marked Defendant's Exhibit S and was received in evidence.)

Mr. Mason: I will offer as the next exhibit in evidence a certificate of the Secretary of the Inter-

state Commerce Commission as to the licensing of the Pihl Transfer & Storage Co.

The Court: Received.

The Clerk: Defendant's T in evidence.

(The document referred to was marked Defendant's Exhibit T and was received in evidence.)

Mr. Mason: I would like to offer as the next exhibit a photostatic copy of the page following page 728 of the New International Encyclopedia, Volumes 21 and 22, showing the vertical striped flag to which I referred.

The Court: Same objection as to relevancy?

Mr. Groen: Yes. I understand that is a standing objection. [177]

The Court: Yes. It will be received.

The Clerk: Defendant's U in evidence.

(The page referred to was marked Defendant's Exhibit U and was received in evidence.)

The Court: When I said "received," they are all received provisionally.

Mr. Groen: I think he is going to introduce that flag before he gets through (indicating).

Mr. Mason: May it be understood that the original of this shows the stripes in red and white?

Mr. Groen: Yes.

Mr. Mason: And I offer the shield used by the Union Pacific Railroad as the next exhibit.

The Court: Received.

The Clerk: Defendant's V in evidence.

(The shield referred to was marked Defendant's Exhibit V and was received in evidence.)

Mr. Mason: It may be stipulated those stripes are red and white?

Mr. Groen: You mean on yours?

Mr. Mason: On the Union Pacific. This is a photostatic copy.

Mr. Groen: Oh, all right. Yes, indeed.

Mr. Mason: I offer next a photostatic copy of page 1038 of the Los Angeles classified telephone directory, showing [178] the advertisement of the All-American Van & Storage Co. with the shield.

Mr. Fihe: What issue, Mr. Mason?

Mr. Mason: That was at the time of the pretrial hearing. When was the pretrial hearing?

The Clerk: June 15th, I believe.

Mr. Groen: I think it was June '54.

Mr. Von Herzen: I think it was June of '54. And I think the issue—I thought we stated at the time what the issue was, but perhaps not. I think we did, though, your Honor.

The Court: Well, the record of the pretrial will show. You have had that written up, haven't you?

Mr. Groen: No, it wasn't.

The Court: I can't read these stenotype notes.

Mr. Von Herzen: No.

Mr. Mason: We can have that.

Mr. Von Herzen: I am sure we can submit that by stipulation. We have it some place.

Mr. Mason: Could it be stipulated these were in 1954?

Mr. Groen: If you say so.

Mr. Von Herzen: I think it is 1953.

Mr. Groen: Except subsequent to the filing of the suit.

Mr. Mason: If we can. If it is different, anybody can object to it.

The Court: That was my objection. [179]

Mr. Von Herzen: I think the testimony will show, your Honor, that that also was the same in previous issues, and I think we have a witness that will testify to that.

The Clerk: Defendant's W.

(The page referred to was marked Defendant's Exhibit W and was received in evidence.)

Mr. Mason: The next is a photostatic copy of page 579 of the Los Angeles classified directory, about the same time. I think it is the same directory. It shows the advertisement of the All-American Storage Co. with the shield.

The Clerk: Defendant's X.

(The page referred to was marked Defendant's Exhibit X and was received in evidence.)

Mr. Mason: The next is a photostatic copy of page 578 of the Los Angeles telephone classified directory. At the same time showing the advertisement of the All-American Storage Company.

The Court: Received.

The Clerk: Defendant's Y.

(The page referred to was marked Defendant's Exhibit Y and was received in evidence.)

Mr. Mason: Next is a photostatic copy of page 576 of the same classified directory showing the advertisement of the Brugger Transfer & Storage Co. using the shield.

The Clerk: Defendant's Z. [180]

(The page referred to was marked Defendant's Exhibit Z and was received in evidence.)

Mr. Mason: Now, Mr. Fihe, you agree to stipulate as to the seal used on the Helms Bakery trucks in and about Los Angeles?

Mr. Fihe: That is right, subject——

Mr. Mason: Since about the 1930 Olympics.

Mr. Fihe: A little bit later than that, '31.

Mr. Mason: But I have here a photograph, colored photograph of the shield appearing over their plant, and the shield is the same on their trucks.

Mr. Fihe: I should know it quite——

The Court: The importance of the shield emblem seems to diminish considerably since plaintiff has rested, without showing the defendant ever used a shield, unless I have overlooked some part of the testimony.

Mr. Fihe: There is evidence in the record showing that the defendant does use the vertical stripes, your Honor.

The Court: Vertical stripes are certainly not a shield. I gathered, on looking at defendant's mark, that he was using an outline map of the United States with vertical stripes.

Mr. Fihe: It is our position it isn't the outline, it is the vertical stripes that count, with the word "National", that combination. That is what strikes the eye, and that is [181] what people remember.

The Court: That is what the court will have to consider.

The Clerk: Is this received, your Honor?

The Court: Yes, received.

The Clerk: Defendant's AA.

(The photograph referred to was marked Defendant's Exhibit AA and was received in evidence.)

Mr. Fihe: I recognize that; I represent Mr. Helms. I can certainly stipulate to the use of that shield. Of course, with the same objection as to relevancy.

Mr. Mason: The next is a photostatic copy of the page following page 102 in the book entitled "Flags of the World" by H. Crenshaw Carr. I think the original is here in the court, if you want to see it. I showed it to Mr. Groen here. It shows the presidential standard of the shield.

The Court: Received.

The Clerk: Defendant's BB.

(The page referred to was marked Defendant's Exhibit BB and was received in evidence.)

Mr. Mason: The next is a colored photograph of the Los Angeles County flag showing the shield.

The Court: Received.

The Clerk: Defendant's CC.

(The photograph referred to was marked Defendant's Exhibit CC and was received in evidence.) [182]

Mr. Mason: The next is a photograph of the symbol of the Los Angeles Chamber of Commerce using the shield.

The Court: Received.

The Clerk: Defendant's DD.

(The photograph referred to was marked Defendant's Exhibit DD and was received in evidence.)

Mr. Mason: The next is a part of the letterhead of, a Veterans Administration letterhead showing the use of the seal.

The Court: Received.

The Clerk: Defendant's EE.

(The document referred to was marked Defendant's Exhibit EE and was received in evidence.)

Mr. Mason: The next is a symbol of the Los *Angeles* Bar Association, showing the shield.

The Court: Received.

The Clerk: Defendant's FF.

(The document referred to was marked Defendant's Exhibit FF and was received in evidence.)

Mr. Mason: The next is a symbol of the City of Los Angeles, showing the shield.

The Court: We are not staying close to rele-

vancy there, are we, Mr. Mason? It isn't a question whether any of this is relevant. I rather think much of it isn't. The municipal seals or things of that nature are far removed from the [183] business of either plaintiff or defendant.

Mr. Mason: The purpose in showing that, your Honor, is that there is nothing unique about the shield that the plaintiff uses. It is purely a patriotic shield, is what we claim, because it is commonly used for patriotic purposes. Anybody has a right to use it.

On the other hand,——

The Court: All right. It has been received. I was just talking, not ruling.

The Clerk: Defendant's GG.

(The document referred to was marked Defendant's Exhibit GG and was received in evidence.)

Mr. Mason: The next is a photograph of one of the United Freight Service vans, taken in Los Angeles,——

The Court: Received.

Mr. Mason: ——about a week ago.

The Clerk: Defendant's HH.

(The photograph referred to was marked Defendant's Exhibit HH and was received in evidence.)

Mr. Mason: Counsel calls my attention to the fact that the original of this Exhibit BB, the presidential standard shows the stripes in red and white.

Mr. Groen: Accepted.

Mr. Mason: As a matter of fact, your Honor please, the stationery of this court has the official shield as a [184] watermark.

The Court: Vertical stripes?

Mr. Groen: Color?

Mr. Mason: No, not in color. I offer certified copies of the file wrapper of plaintiff's trade-mark Registration 548,018.

The Court: Received.

The Clerk: Defendant's II.

(The document referred to was marked Defendant's Exhibit II and was received in evidence.)

Mr. Mason: Next, a certified copy of the file wrapper and contents of plaintiff's trade-mark Registration No. 563,950.

The Court: Received.

The Clerk: Defendant's JJ.

(The document referred to was marked Defendant's Exhibit JJ and was received in evidence.)

Mr. Mason: I will call Mr. Dean.

ALFRED EDWARD DEAN

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated please.

Your full name, sir?

The Witness: Alfred Edward Dean.

The Court: Before we take Mr. Dean's testimony, the [185] clerk will call our 2:00 calendar.

(Testimony of Alfred Edward Dean.)

(Other court matters.)

The Court: We will return to the case on trial.

Direct Examination

By Mr. Mason:

Q. Mr. Dean, you are the defendant in this case? A. Yes, sir.

Q. When did you start your present business?

A. October of 1944.

Q. Under what name?

A. National Van & Storage Co.

Q. You entered into the sales agency contract with the plaintiff in November 1944, did you not?

A. That is correct.

Q. With what representative of the plaintiff corporation did you deal in entering into that contract? A. With O. J. Plummer, Jr.

Q. Did you have anything to do with the phraseology of the contract? A. No, sir, I did not.

Q. Just what did you do concerning it, as a sales agent for the plaintiff?

A. We held ourselves out for movements of household goods in interstate commerce.

Q. Would you book shipments in interstate commerce [186] for the plaintiff?

A. Yes, we would.

Q. How did you do that booking?

A. Well, we do it through the advertising or holding out of our services to the public or the military.

Q. Now, was any advertising material supplied

(Testimony of Alfred Edward Dean.)

to you by the plaintiff corporation during the time that you were acting as a sale agent under that contract? A. Not to my recollection, no.

Q. Just what was given to you by the plaintiff to enable you to do business?

A. The agreement itself, which recited the terms——

Q. I don't want you to state what was the agreement. Was there anything in the nature of stationery or bills of lading or anything, delivered to you by the plaintiff?

A. No. The only thing that I recall are decals to display on our windows, bearing the name of the plaintiff.

Q. How big was that?

A. Approximately 18 by 12.

Q. What was stated on that?

A. Beg pardon?

Q. What was stated on the decals?

A. The name of the plaintiff, National Van Lines, Inc.

Q. Was there anything stated about your being an agent? [187]

A. I beg your pardon. It did state, "Agents for."

Q. During that time that you were operating as a sales agent for the plaintiff, did you carry on any transfer or storage business of your own?

A. Yes, I did.

Q. Under what name?

A. Under the name of National Van & Storage

(Testimony of Alfred Edward Dean.)

and subsequently under the name of National Transfer & Storage.

Q. When did you change to the National Transfer & Storage?

A. To the best of my recollection, sometime in November, I believe, of 1944.

Q. Now, did you have regular correspondence with the plaintiff while you were acting as its sales agent?

A. Normal correspondence, I would say; yes, there was bound to have been some.

Q. What stationery did you write your letters on? A. On our stationery.

Q. You mean the National Transfer & Storage stationery? A. Yes.

Q. When did you adopt this map of the United States which you display on your trucks?

A. In 1949.

Q. What time in 1949?

A. I don't have the exact month, Mr. Mason.

Q. Now, are you still operating your business under the name "National Transfer & Storage Co."? A. No, sir, I am not.

Q. When did you change?

A. I don't have the date fresh in my mind, but it seems—oh, it must have been six months.

Q. Now, prior to completely eliminating the name "National Transfer & Storage Co.,", did you also show your name "Dean Van Lines" on your trucks?

A. Yes.

Q. How did you show that?

(Testimony of Alfred Edward Dean.)

A. Well, just as it appears now, "Dean Van Lines."

Q. Was that when you said, "Also known as National Transfer & Storage Co."?

A. I don't believe that we showed that on our trucks.

Q. Did you show that on your stationery?

A. Yes, and other documents.

Q. Just what did you show on your trucks, now, starting from the time you commenced to change from the use of the "National Transfer & Storage Co."?

A. Well, I showed one or the other. But, to my recollection, never the two. There may be some of the units that were lettered, "Also known as National Transfer & Storage." I am not too clear on it.

Q. Now, is the name "National Transfer & Storage Co." [189] now removed from all your equipment? A. I believe, yes.

Q. You show on that equipment at this time what? A. Dean Van Lines.

Q. Now, you have a picture of your equipment as it is since you changed it, changed the name?

A. Beg pardon?

Q. Do you have a picture of your equipment and premises since you have changed the name?

A. Yes, I do. Mr. Von Herzen has a brochure over there, I believe, that shows it.

Q. I show you a photograph, and ask you if that is it. A. Yes, that is right.

(Testimony of Alfred Edward Dean.)

Q. Now, this large sign here, where is that located? A. San Diego, California.

Q. And that is on your office building, is that right?

A. It is secured right to the warehouse.

Q. And alongside of this—those are a couple of your trucks? A. Yes, sir.

Mr. Mason: I offer this in evidence as Defendant's next exhibit.

The Court: Received.

The Clerk: Defendant's KK in evidence. [190]

(The photograph referred to was marked Defendant's Exhibit KK and was received in evidence.)

Q. By Mr. Mason: What about your telephone listing, Mr. Dean, how do those read at the present time?

A. I believe they are all under the new name of Dean Van Lines.

Q. You have a copy of the page of the Los Angeles classified directory showing your present listing? A. I have seen a copy of it.

Q. Is this it? A. Yes.

Q. This is taken from the August 1954 issue of the Los Angeles classified directory, page 1058.

A. Yes.

Q. Is that correct? A. Correct.

Mr. Mason: I offer this in evidence, your Honor.

The Court: Received.

The Clerk: Defendant's LL in evidence.

(Testimony of Alfred Edward Dean.)

(The page referred to was marked Defendant's Exhibit LL and was received in evidence.)

Q. By Mr. Mason: Now, when you started your business in 1944, how much equipment did you have? A. I had four units.

Q. What do you mean "units"? [191]

A. Four vans.

Q. How much equipment do you now have?

A. I believe 83.

Q. Do you know how much equipment you had in November of 1951? A. No, sir, I don't.

Q. Now, can you tell the court how much business you did in your own business from November 1944 to November 1951?

What is that you have in your hand?

A. This is a report on those figures.

Q. Compiled from your books?

A. Yes. The dates again were what?

Q. November 1944 to November 1951.

A. $2,440,998.77.

Q. How much does that show for the year 1944?

A. $8,889.81.

Q. For the year 1945? A. $161,896.68.

Q. For the year 1946? A. $282,007.59.

Q. For the year 1947? A. $157,538.64.

Q. For the year 1948? A. $140,632.80.

Q. For the year 1949? [192]

A. $409,534.75.

Q. For the year 1950? A. $592,231.27.

Q. For the year 1951, up to November 9th?

A. $688,267.27.

(Testimony of Alfred Edward Dean.)

Q. The total of those figures gives $2,440,998.77, is that correct? A. Yes.

Q. Now, from February 1950 to the end of 1950, what was your own business? That was the date your contract was terminated, was it not?

A. Yes, sir. I don't think I have the separation on the specific dates. February of '50 to the end of the year was $555,372.82.

Q. Now, for the year 1951?

A. $851,278.59.

Q. The year 1952? A. $1,467,989.80.

Q. The year 1953? A. $1,627,152.20.

Q. For the year 1954 through May 31st?

A. $668,454.59.

Mr. Mason: I offer this——

Q. By Mr. Mason: You state this was taken from your records? [193]

A. Yes, sir.

Q. When?

A. Just recently, just received it in the last couple of days.

Mr. Mason: I offer this in evidence as illustrative of the witness' testimony.

The Court: Received.

The Clerk: Defendant's MM.

(The document referred to was marked Defendant's Exhibit MM and was received in evidence.)

Q. By Mr. Mason: Now, where was that business done, Mr. Dean? Was that within the State of California? Was that interstate, or how?

(Testimony of Alfred Edward Dean.)

Take first up to the time you terminated your contract, February 1950.

A. Up to that time it had been done primarily in San Diego, in the Bay Area.

Q. In the State of California?

The Court: San Diego Bay Area?

The Witness: San Francisco Bay Area.

Q. By Mr. Mason: Now, do those figures include any of your commissions you received from the National Van Lines on interstate business you booked for them? A. Yes, they do.

Q. About percentage of the total would that be?

A. Less than four per cent.

Q. Now, commencing February 1950, after you terminated the contract with the National Van Lines, and down to date, where has your business been conducted, that is, where have your shipments gone to and from? A. From California.

Q. All within the State?

A. All within the State, yes.

Q. Do you do any interstate shipments?

A. I service interstate shipments through interline.

Q. Explain how you do that.

A. I hold hands, as it were, with another carrier to render service in States that I do not have authority in.

Q. You turn the freight over to the other carrier, is that it? A. Yes, sir.

Q. Your trucks do not go out of the State of California? A. No.

(Testimony of Alfred Edward Dean.)

Q. Now, when was the first time that you ever received any complaint from the plaintiff corporation about your use of the name "National Transfer & Storage Co."?

A. I believe it was in 1952.

Q. To refresh your memory, was it the time you received a letter from their attorney?

A. Yes, sir. [195]

Mr. Mason: May it be stipulated that was November 9, 1951?

Mr. Groen: If that is what the record shows, yes.

Mr. Mason: That would be November 9, 1951.

Q. By Mr. Mason: Now, you had not up to that time received any complaint from the plaintiff about your use of the name? A. No, sir.

Q. You heard Mr. McKee testify in court this morning that he might have discussed it with you over the phone shortly after the cancellation of the contract. Do you recall any such conversation?

A. Not about that, no, sir.

Q. Mr. Dean, you heard Mr. Minear testify yesterday, who I believe testified he had been employed by the North American Transfer & Storage Co. for about seven years. A. Yes, sir.

Q. You heard him testify about observing your sign in San Diego? A. I did.

Q. Would that have been the sign that is shown on this photograph which we just placed into evidence? A. No, sir.

Q. Not this sign?

(Testimony of Alfred Edward Dean.)

A. I don't believe he had reference to that sign, no. [196]

Q. Did you have another sign there?

A. We had the "National Transfer & Storage" sign on a previous building, a building that we were forced out of here within the last year.

The Court: Is the sign still there?

The Witness: This is the sign, only it has been modified to reflect Dean Van Lines, in lieu of National Transfer & Storage.

Q. By Mr. Mason: Now, have you within the past seven years had any business connection with the North American Van Lines?

A. Yes, I was there agent.

Q. When?

A. Immediately after my termination with Mr. McKee.

Q. Now, do you have any familiarity with the various other transfer and storage companies operating in the United States?

A. I am sorry. I didn't get the question.

Q. I say, do you have any familiarity with the other transfer and storage companies operating in the United States? A. Yes, sir, I do.

Q. Do you know of any other than the plaintiff, National Van Lines, using the word "National" as a prefix in the name? [197]

A. Yes, sir, I do.

Q. Can you name some of them?

A. We have National Transfer of Seattle, Wash-

(Testimony of Alfred Edward Dean.)

ington; National Movers, National Moving & Warehouse, National Van Lines.

Q. Are you referring to the plaintiff?

A. No, I am referring to the firm in Wisconsin. National Carloading, National City Transfer & Storage.

Q. Where is that?

A. That is in National City.

Q. California?

A. California; suburb of San Diego. I can't recall the rest of them.

Q. Do any of those, to your knowledge, operate country-wide?

A. Some of them had quite extensive authority, yes, sir.

Q. Which ones?

A. National Movers, I believe, have quite a broad certificate, and I believe it is National Moving & Warehouse that is a New York firm that have quite a broad certificate.

I don't know the extent of the permit of the firm in Seattle, but I understand they have a coastal operation.

Q. Is that all you can think of?

A. At the moment, yes, sir. [198]

Q. Do you know of any other transfer and storage companies which use a shield like the plaintiff's shield on their trucks? A. Yes, I do.

Q. Name those.

A. A company by the name of Brugger Van & Storage Co. All-American Van & Storage.

(Testimony of Alfred Edward Dean.)

Q. Los Angeles?

A. They are local firms, yes.

Pan-American Van & Storage.

Those are the immediate companies I can think of.

Q. Now, you refer to the All-American, Brugger, Pan-American Storage as using shields.

I now exhibit Exhibits Z, W, X, and Y, and ask if those are the companies, or if those show advertisements of the companies which you have mentioned. A. Yes, sir.

Q. Do you know how long those companies have been using those shields?

A. I believe the Brugger Company dates back to 1936 or '37.

Q. Have you seen it that long?

A. Yes, sir.

Q. How about the other companies?

A. I first noticed the All-American shield when they [199] came into prominence in our field. They have been pretty progressive locally, a local company. I believe it was around 1939 or '40 that I first noticed it.

Q. Mr. Dean, what has been your experience as to the importance of the name of a transfer company in obtaining business of moving household furniture.

A. I don't know that I quite follow. What has been my experience what, sir?

Q. As to relative importance of the particular name of the concern, the moving company. Is that

(Testimony of Alfred Edward Dean.)

of importance to the customers, so far as your experience goes?

A. Well, yes and no. Some of the firms that have put themselves in national prominence might have a little less difficulty than we have enjoyed in developing traffic.

Unfortunately, we have enjoyed a little more difficulty in procuring business because the companies we represented, including ours, were somewhat of an unknown, and therefore found it a little more difficult to book traffic in great volume.

Q. Well,——

A. Perhaps to add to that, to my yes statement, I think you will find that firms are leaders in the field, such as the Mayflower Company, for instance, and I believe they gain an awful lot of traffic through the fact their name has become significant and they have become a subconscious [200] thought with the shipping public, where such has not been the case with our service.

Q. Do you know of any moving and transfer companies using the map of the United States on their vans, other than yours? A. Yes, I do.

Mr. Groen: Objected to as irrelevant.

The Court: I think that we have had enough evidence to establish the point which has been asked. I hope you won't labor it. I think it is perhaps relevane.

Mr. Mason: I will withdraw the question then. I don't want to unduly take up the court's time.

Mr. Von Herzen: There is some question about

(Testimony of Alfred Edward Dean.)

the date of the book of the classified directory that was introduced.

Mr. Von Herzen: I have located the date. The pages 576, 578, and 579, which are here in evidence as exhibits.

Mr. Fihe: Exhibits X, Y, and Z.

Mr. Von Herzen: X, Y, and Z I have here.

Mr. Fihe: That is right.

Mr. Von Herzen: They are from the 1943 classified directory. 1943; 11 years ago.

The Court: Thank you.

Mr. Von Herzen: It may be so stipulated?

Mr. Groen: If that is what you say, yes. [201]

Q. By Mr. Mason: Am I correct in understanding, from your testimony, at this time you are not carrying the name "National Transfer & Storage Co." in any telephone directory.

A. To the best of my knowledge, that is correct.

Q. Have you given instructions to the telephone companies to remove any reference to "National Van & Storage Co."? A. We have, yes.

Q. When did you do that?

A. I don't recall when the bulletin was issued. I think that has been out possibly nine months.

The Court: Have you used the "National" name in any other way during the past nine months?

The Witness: No, sir. I endeavored to get them out of the issues made by the telephone company.

Q. By Mr. Mason: I didn't hear you.

A. I say we have the instructions out to substi-

(Testimony of Alfred Edward Dean.)

tute as time will permit, with the various directories, in any of the areas where we operate.

Q. I have handed you a document here. What is this?

A. This is my trade-mark listing record. This is my order for trade-mark service.

Q. What do you mean by that?

A. Well, this type of service is furnished companies enjoying the trade-mark that they wish to publicize in any [202] given area. All we have to do is notify the telephone company and that will appear in a given area as you see there (indicating).

Q. In all of these instances you have given your name as Dean Van Lines?

A. Yes, sir. I might add——

Q. This is dated June 1954, is that correct?

A. Yes.

Q. You gave the instructions to the telephone company at that time?

A. Yes; Interstate Commerce Commission, Public Utilities. We have given them notice of our desire to abandon the title of National Transfer & Storage. That is all a matter of record.

Mr. Fihe: I didn't hear that. May I have the answer read? His voice was rather low.

(The answer was read.)

The Witness: Mr. Fihe, I think Mr. McKee would get a copy of the publication.

Mr. Mason: I offer this in evidence as defendant's next exhibit.

(Testimony of Alfred Edward Dean.)

The Court: Received.

The Clerk: Defendant's NN in evidence.

(The document referred to was marked Defendant's Exhibit NN and was received in evidence.) [203]

Q. By Mr. Mason: Have you made any change of your name to the Dean Van Lines to the Interstate Commerce Commission? A. Yes, sir.

Q. When was that, do you know?

A. Just recently, within the last four months.

Q. So your certificate from the Interstate Commerce Commission now only reads "Dean Van Lines"? A. Yes.

Q. It is true that prior to that it read "Dean Van Lines and/or National Transfer & Storage Co."? A. That is correct, yes, sir.

Mr. Mason: I think that is about all. You may cross-examine.

Cross Examination

By Mr. Groen:

Q. You remember when we took your discovery deposition? A. Yes, sir.

Q. June 14th. A. I do.

Q. You recall that you said then you were going to use both, referring to both names, Dean Van Lines and National Transfer & Storage?

A. Yes, sir. [204]

Q. You say you issued a bulletin nine months ago saying you were going to discontinue National?

A. I said about that time; I wasn't sure of the date, Mr. Groen.

(Testimony of Alfred Edward Dean.)

Q. There is no dispute about the fact you testified you were going to use both and you said that in June?

A. Yes, sir, I believe that is correct.

Q. All right. Now, you say that you had the name "National Van & Storage" or "National Transfer & Storage" before you took the agency agreement with plaintiff? A. Yes.

Q. Now, actually, you didn't have that name more than about ten days, isn't that right?

A. About that, yes, sir.

Q. And you started in business, say, about ten days prior to the signing of this agreement with National Van, the plaintiff?

A. That is drawing it pretty thin somewhere.

Q. I think it is a matter of record.

A. Yes; it wasn't long.

Q. You had, of course, been negotiating with National Van Lines, the plaintiff, prior to the actual signing of the agreement. All that was done at one time, in contemplation of your arrangement with them, wasn't it?

A. Pretty much, sir, yes. [205]

Q. Now, you said that you adopted the map which you used with your name in 1949. Did that map include the vertical stripes at that time?

A. Yes, it did.

Q. Do you recall that you testified in your discovery depositions that you adopted the insignia or stripe design in 1950 or '51?

(Testimony of Alfred Edward Dean.)

Mr. Mason: I think you can show him his testimony.

Mr. Groen: I will show it to him.

The Witness: I developed the true information in the meantime on that, Mr. Groen, and it happened to be, I believe, November of '49.

I say that because we had an order placed for letterheads bearing that insignia.

Q. By Mr. Groen: It was late in '49, wasn't it? A. Yes.

Q. You canceled your contract with plaintiff early in 1950, didn't you, February 1950? That is in the record.

A. Yes, I guess that is right.

Q. There had been some difficulty for several weeks or months prior to the cancellation of the agreement, hadn't there?

A. That is the reason I hesitated, the way you put the question. Yes.

Q. Is that your complete answer? [206]

A. Will you repeat the question, please?

Q. Well, there had been some difficulty between you and plaintiff about the agency relationship prior to the actual cancellation?

A. Well, there had been a little misunderstanding, that is right. It grew in proportion and found sufficient cause to terminate it.

Q. That went on for several weeks or several months before you actually terminated?

A. No, it went on for less than a week.

(Testimony of Alfred Edward Dean.)

Q. You mean to say that trouble arose within a week and you canceled?

A. No. The misunderstanding took place on one date and within a week of that time we terminated.

Q. Did you have another agent at the time that you actually canceled on February 20, 1950, with plaintiff? A. Did I have an agent?

Q. Or did you have another principal that you worked with on a national basis at that time?

A. No, I did not, sir.

Q. I have before me your letter of cancellation dated February 20, 1950.

Mr. Groen: I will ask that be marked as Plaintiff's Exhibit No.——

Mr. Fihe: Pardon the interruption. Do we want to mark [207] our depositions with exhibit numbers?

Mr. Groen: Is that necessary, your Honor?

The Court: How do you wish to mark them?

Mr. Fihe: With the corresponding exhibit numbers; don't you think that would more properly identify them?

Mr. Groen: I gave the names.

The Court: I think it should have a number so that in searching back through the record we will not have to search——

Mr. Fihe: May we digress a moment then to get those numbers on them. Then the defendant's deposition, Mr. Dean's deposition, will be 54.

Mr. Groen: This will be——

Mr. Fihe: 55.

(Testimony of Alfred Edward Dean.)

The Clerk: 55.

(The document referred to was marked Plaintiff's Exhibit 55 for identification.)

Mr. Groen: You are familiar with this?

Mr. Mason: Yes.

Q. By Mr. Groen: Now, returning to my question, Mr. Dean, this document just marked No. 55, isn't that your letter of cancellation of the agreement with plaintiff National Van Lines, Inc.?

A. Yes, sir.

Q. Doesn't that show right on the face of it you are [208] agents for Republic Van Lines?

A. Yes.

Q. Hasn't that been stamped over to remove the place that you are agent for plaintiff?

A. I had to have an immediate connection after termination, to cover my shipments.

Q. I thought you just testified you didn't have an agency.

A. You said prior to termination.

Q. Well, all right. This letter was written——

A. I don't think you will find any traffic. I think it might have been done.

Q. In other words, you had your agreement with Republic before you canceled with National?

A. No, we did not. The agreement date with Republic would not be prior to this one.

Q. Then you mean to say you just put that on February 20, 1950, when you wrote plaintiff canceling the contract and you just slapped on there "Agent for Republic"?

(Testimony of Alfred Edward Dean.)

A. Yes, that is a change that took place in a hurry.

Q. You never talked to Republic, whether you could represent them?

A. Not prior to our difference with Mr. McKee.

Q. Not prior to the time you put their name on there and stamped out plaintiff's name? [209]

A. That is very possible.

Q. You just put that there and hadn't talked to them?

A. No; it probably wouldn't make sense.

Q. You had an agreement with Republic prior to that date or you didn't. You show it on your letterhead as of that date.

A. This actually was in support of a cancellation that had taken place sometime prior to the letter, Mr. Groen, and that was through. I believe I have the teletype communication that terminated our working officially.

This was merely confirmation petition to Mr. McKee, to make an accounting of the moneys due us. So this letter actually was not the official termination. The termination had been in effect some time before the letter was written.

Q. I thought we just got through testifying that the termination was under discussion a very brief time a week prior.

A. I can hardly develop the teletype message Mr. McKee and I had; he will recall that.

Q. When would you have put "Agent for Republic Vans" on this letterhead?

(Testimony of Alfred Edward Dean.)

A. When I became their agent.

Q. When was that?

A. At the time I wrote this letter to Mr. McKee I was an agent for Republic. This had been done in the interim [210] and that is how I happened to have that letterhead.

The termination of our working agreement with Mr. McKee actually took place possibly a couple of weeks before this letter was written.

Q. At that time you had an agreement already——

A. No, I did not. That is why I say, it is unlawful for me to have an agreement with another carrier that parallels the authority Mr. McKee had to service.

Q. When would you place your agreement with Republic?

A. Between the time that we terminated and the time that was written (indicating).

Q. How much time elapsed on that?

A. I would have to guess on that, Mr. Groen. I would say a couple of weeks.

Q. Then your discussion as to termination with plaintiff was more than a week, you testified to, earlier then? A. That is possible.

Mr. Groen: It is offered as Exhibit 55.

The Court: Received.

(The document heretofore marked Plaintiff's Exhibit 55 was received in evidence.)

Q. By Mr. Groen: Is it true, Mr. Dean, that you stamped the name "Agent for Republic Van Lines" right over the same line where you had pre-

(Testimony of Alfred Edward Dean.)

viously had "Agent for National Van Lines, Inc."?

A. Yes, I think we used the same stationery.

Mr. Groen: Please mark this for identification.

The Clerk: Plaintiff's 56 for identification.

(The document referred to was marked Plaintiff's Exhibit 56 for identification.)

Q. By Mr. Groen: Now, Mr. Dean, I am showing you another letter you wrote to Mr. McKee, dated January 31, 1950, marked Exhibit 56 for identification. Are you familiar with that?

A. Yes.

Q. You wrote that letter, didn't you?

A. Yes, sir.

Q. That also has on there, "Agent for Republic Lines," and that was prior to the termination by some twenty days, wasn't it?

A. That is right.

Q. And then obviously you must have been an agent for Republic officially.

A. I don't have the exact dates, Mr. Groen. I can tell you this: We can support the termination before this new agency was gone into. It would have to be that way, because none of the carriers would tolerate a dual representation besides the Government.

Q. Isn't it a fact the controversy with National Van Lines about clearing and discounts and prompt payments was [212] in effect some six months prior to cancellation.

A. The problem of payment had gone on for a couple of years.

(Testimony of Alfred Edward Dean.)

Q. And you had in mind of canceling the agreement?

A. No. They merely found it difficult to stay up to date. They were always in arrears.

Q. Didn't they pay just once a month?

A. No, no; nothing like that. They paid whenever they got hold of some money.

Mr. Groen: This letter is offered as No. 56.

The Court: Received.

(The document heretofore marked Plaintiff's Exhibit 56 was received in evidence.)

Q. By Mr. Groen: Didn't you testify, Mr. Dean, that immediately upon termination of your license agreement, or agent agreement with plaintiff you became agent for North American? Didn't you say that a few moments ago?

A. I would like to clear that, if I may have an opportunity to explain it?

Q. Yes.

A. With Mr. McKee we had full coverage of all the States. When we terminated with him we had to ally ourselves with a carrier or combination of carriers, to effect service to the same territories. Therefore, we had to take agency with a combination of carriers, rather than any one [213] carrier. That is why we have the agency agreement with the North American people in the territory that our Republic affiliation could not service.

Q. Did you list North American as your affiliate on your letterhead, like you did Republic?

(Testimony of Alfred Edward Dean.)

A. I didn't have the opportunity, Mr. Groen. We didn't last with them very long.

Q. You didn't?

A. We didn't last very long with them.

Q. Did you have any other agency relationship with national shippers?

A. Yes. In order to effect service to the territory that represented a void in the Republic authority.

Q. Now, I think you testified also on your discovery deposition, did you not, Mr. Dean, that you received complaints or your office received complaints that were intended for National Transfer, to plaintiff, about some of their troubles they had? Did you answer yes?

A. You didn't give me an opportunity. Yes, sir.

Q. That is a fact, you received a number of those complaints in San Francisco and elsewhere?

A. No. I received some in Monterey, specifically.

Q. Your office in San Francisco received complaints of that nature, also, didn't they? [214]

A. Not to my recollection.

Q. You remember you had a Mr. Green there, who was the manager of your office?

A. Yes.

Q. You don't recall that he had reported to you that complaints were received there from the public about services of National Van Lines, the plaintiff? A. No, sir, I don't.

Q. But it is a fact your offices and probably you personally did receive some complaints that

(Testimony of Alfred Edward Dean.)

should have been directed to National Van Lines, the plaintiff? A. It is possible, yes.

Q. You testified that they didn't, didn't you?

A. I said in one area we had some specific—or they were called specifically to my attention. That was in the Monterey area.

Q. In other words, people who had received the moving service from plaintiff called your office and complained to you about the service, thinking that they had plaintiff's number, didn't they?

A. We were the only company advertising in that area at that time. We were advertising.

Q. You advertised under "National" with the stripe design, as the directory showed?

A. We were advertising National Transfer & Storage. [215] Mr. McKee apparently didn't have any representation.

The normal thing for those people to do was to call our office. They might have called National Carloading or National Biscuit.

Q. But they called you.

A. Yes, some of them we know have.

Q. You wouldn't deny this also happened a number of times in San Francisco, where plaintiff did have an office and you also had an office, isn't that correct? A. I don't recall it, no.

Q. You wouldn't deny that that happened in San Francisco?

A. No, I wouldn't deny it, either; I don't know.

Q. Now, isn't it true, Mr. Dean, that you have recently applied for and received permission to

(Testimony of Alfred Edward Dean.)

operate or to take over the interstate business of Knowles Vans? A. Yes, sir.

The Clerk: Plaintiff's 57 for identification.

(The document referred to was marked Plaintiff's Exhibit 57 for identification.)

Q. By Mr. Groen: I will hand you this document marked for identification as Plaintiff's Exhibit 57, and ask you if you haven't seen that before, a decision from the Interstate Commerce Commission, granting your application to take over the Knowles Line? [216] A. I have.

Q. That is true? A. Yes.

Q. Do you know about this? A. Yes.

Q. This document throughout says, "Alfred Dean, doing business as National Transfer & Storage or Dean Van Lines". A. Yes.

Q. That is the way your petition was filed and that is the way the application was granted?

A. This action had been started back some time ago.

Q. This is dated October 12, 1954.

A. I indicated that the last petition to the Commission to make the change to "Dean Van Lines" was——

Mr. Von Herzen: It shows the date on which the names were used; November 1953.

Q. By Mr. Groen: This gives you authority now to operate in interstate commerce.

A. 46 states, yes.

Mr. Groen: The document is offered as Exhibit 57.

(Testimony of Alfred Edward Dean.)

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit 57 was received in evidence.)

Q. By Mr. Groen: How many States did you say? A. 46. [217]

Q. Haven't you also operated in conjunction with Howard Van Lines in interstate commerce?

A. Yes, I have.

Q. Their van lines travel from coast to coast, isn't that right?

A. I think they have 39 to 40 States.

Q. In connection with their van lines or their vans, they have used the striped insignia with the words "National Transfer & Storage" or the word "National" and the striped insignia?

A. That is correct. I would like to clear the record, if I may. Those units are owned by us, but leased to them.

Q. Under whose authority are they operated?

A. Under the direction and control of the Howard people. We haven't the ability to go out of the State of California.

Q. It is a fact those units bearing the word "National" and stripe design unit travel in interstate commerce for you?

A. That is right; for Howard.

Q. For Howard in how many States?

A. I think it is 39 or 40 States.

Q. Did you advertise in directories service coast to coast prior to receiving this franchise or the right to purchase the Knowles Van Lines?

(Testimony of Alfred Edward Dean.)

A. No, sir.

Q. Do you recall the time this discovery deposition [218] was taken June 4th, Mr. Dean, and you were asked about your mark, the question specifically on page 6:

"Q. What was the occasion for adopting this design along with the name?"

We were talking about "National" and the stripe design. And you said:

"Oh, my feeling that it had a lot of trademark value, and I think that practically every company has some sort of trade-mark to identify their service." Do you remember saying that?

A. Yes, I do.

Q. Of course, there is no dispute about that fact, is there? A. No.

Q. You said no? A. No; that is right.

Q. During your discovery deposition I also asked you to supply the figure with respect to your sales of services, your gross income since the termination of the agreement, up to date, and you reported yesterday that that was some five million one hundred seventy thousand two hundred forty-eight dollars, is that right?

A. Something like that.

Q. That is approximately right? [219]

A. Yes, sir.

Q. Did your sales increase in the year 1950 over the year 1949 in the State of California?

A. I believe so.

(Testimony of Alfred Edward Dean.)

Q. And they increased in '51 over the year '50, didn't they? A. I think so, yes.

Q. And they increased in '52 over '51, didn't they? A. I believe that is right.

The Court: We will take a brief recess.

(Short recess taken.)

Q. By Mr. Groen: Mr. Dean, it has been established that you were an agent for plaintiff National Van Lines and agents for Republic and one more. Who was that you just testified about?

Mr. Mason: All-American——

The Witness: North American Van Lines.

Mr. Fihe: Howard.

Q. By Mr. Groen: Howard. Were you agent for anyone else?

A. The relation with Howard is an interline relationship; not an agency.

Q. Have you been tied up with anyone else but the four mentioned?

A. Well, we have done business—we have the ability [220] to do business with any of the carriers that are participants in the same tariff, Mr. Groen, that we are given.

Q. Do you have direct relationship you had with National Van Lines?

A. Yes. The Interstate Commerce Commission gave us a privilege to interline with any carrier, any of the eight or nine hundred carriers.

Q. You were definitely tied up with plaintiff, with Republic——

(Testimony of Alfred Edward Dean.)

A. As an agency I was tied up with Mr. McKee.

Q. And with Republic?

A. And with Republic.

Q. With Howard?

A. No. With Howard I am interlining. I am getting the traffic in my name and holding hands with Mr. Howard, to effect service to the points I don't have any authority.

Q. Then you testified, too, I believe, you don't advertise under your name as doing business in 48 States or coast to coast business.

A. I do here. I do in California; it is my privilege.

Q. You have so advertised?

A. I surely have.

Q. That you have a 48-State coverage?

A. Yes.

Q. For Dean Van Lines? [221]

A. Right.

Q. And what is this arrangement with Howard? Does Howard operate in the 48 States?

A. Howard, I believe, has 39 or 40 States.

Q. That is not 48. A. No.

Q. What had Knowles you are just taking over? They don't have 48 States, either, do they?

A. No, they have 46 States.

Q. There is nowhere you have a direct 48-State coverage?

A. I do with combination of carriers, yes. For instance, I want to go to the Northwest. I can interline with people like Mac Hugo, Hunt Transfer

(Testimony of Alfred Edward Dean.)

Co., or anyone that is a participant in the same tariff.

Q. Then you do advertise your own company in California as 48-State coverage then, don't you?

A. That is right.

Mr. Groen: That is all.

Redirect Examination

By Mr. Mason:

Q. Mr. Dean, with respect to this Knowles permit which you obtained the Interstate Commerce Commission permission to take over, and in which decision you are mentioned as the National Transfer & Storage Co., when was the application for that filed? [222]

A. Late November of '53, Mr. Mason.

Q. So that in between the time you filed this application and the time this was handed down in October 1954 you had changed your name?

A. Correct.

Q. Now, is this in force now, this——

A. No, that is awaiting a petition for reconsideration, that has been filed by the protestants to that, in that case.

Q. So that you have not yourself had interstate shipments as yet. A. No, sir.

Q. There was some mention made in your cross examination about a photograph of the Howard Van Lines, which shows on the bottom part of it, "National Transfer & Storage Co." with your map.

A. Right.

(Testimony of Alfred Edward Dean.)

Q. Has that been changed on those Howard Van Line trucks? A. Yes, it has.

Q. What does it show now?

A. It shows Dean Van Lines.

Mr. Mason: That is all.

Mr. Groen: No further cross.

(Witness excused.)

The Court: Call the next witness. [223]

Mr. Mason: I will call Nicholas Shishkoff.

NICHOLAS SHISHKOFF

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your full name, sir?

The Witness: Nicholas Shishkoff.

Direct Examination

By Mr. Mason:

Q. What is your business, Mr. Shishkoff?

A. I am the manager of the van lines division of Dean Van Lines.

Q. How long have you had that position?

A. Since the 1st of November, 1954.

Q. What was your experience in the van lines business up to that time?

A. My experience in the van lines business dates back to 1946, at which time I became associated with an Illinois corporation called the Atlas Van

(Testimony of Nicholas Shishkoff.)

Lines, and I continued with that corporation through its succession to a Delaware corporation, and was with them until January of 1953 in the capacity of operations manager and subsequently general manager.

At that time I left that company and became associated with the American Red Ball Transit Company of Indianapolis, Indiana, in the capacity of assistant general manager. [224]

Q. Do you have any familiarity with the various van lines operating in the United States?

A. Yes, I have.

Q. Do you know of any transfer and storage company other than the plaintiff, National Van Lines, which uses the word "National" as a prefix to its name? A. Yes, I do.

Q. Can you name some of those with which you are personally familiar?

A. There is the company owned by Mr. Abe Mechanic of Milwaukee, Wisconsin, National Van Lines.

Q. How long have you known of that company?

A. Since 1949. There is National Movers of West New York, New Jersey, I believe it is.

Q. Where do they operate, do you know?

A. National Movers operates to various States. I think their franchise covers some twenty or twenty-five States.

Then there is another company in New York City known as National Moving & Warehouse Corpora-

(Testimony of Nicholas Shishkoff.)

tion. That also has a considerable franchise and operates in about the same number of States.

Q. Any more?

A. Those are the companies using the word "National." There is a variation, there is a Nation-Wide Van Lines in New York. I don't know whether that is material or not. [225] Those are the ones I think of offhand.

Q. Have you ever heard of the National Carloading Corporation? A. Yes, I have.

Q. What kind of a business does that carry on?

A. They carry a freight forwarding business, which includes the forwarding of crated household goods, and the forwarding of household goods in what is known as a wrap and pad proposition.

Q. Where do they do business?

A. They do business throughout the country.

Q. Is that an old company?

A. Yes, it is.

Q. Do you know of any transfer and storage companies in the United States that use a shield having vertical red and white stripes on it, like the plaintiff's, National Van Lines?

A. Well, the one that—the transportation—did you say transportation or transfer companies?

Q. Transfer companies.

A. The one I think of at the moment is All-American here in Los Angeles. I don't think of any others at this time.

Q. Do you know of any that use maps on their vans?

(Testimony of Nicholas Shishkoff.)

A. Yes, Nation-Wide Van Lines of New York is one I [226] recall offhand that uses a map on its vans. There are others that I recall that carry it on their stationery.

Nation-Wide Van Lines also carries it on its stationery. And there are one or two other companies, at least, that carry it as a background item on their letterheads.

Q. Do you know of any transfer companies operating in Los Angeles, other than the National Van Lines, which has the word "National" as a prefix to its name?

A. Since my association here on the West Coast is just a little over a month old, I don't recall any offhand. I am not familiar with very many of the companies.

Q. During your service with Dean Van Lines, has any instance of public confusion as between the plaintiff corporation and the defendant ever come to your attention? A. None.

Mr. Mason: That is all.

Cross Examination

By Mr. Groen:

Q. Mr. Shishkoff, did you ever see a mark or a name in this industry or this line of service that was dominated by the word "National" and vertical stripes together?

Mr. Mason: I object to that as calling for a conclusion.

(Testimony of Nicholas Shishkoff.)

Mr. Groen: I asked if he ever saw it.

The Court: Overruled. [227]

Mr. Mason: As to whether it was dominated or not; that is something for the court.

The Court: It will be for the court to conclude.

Mr. Groen: I will rephrase my question.

Q. By Mr. Groen: Did you ever see a name identifying indicia or trade name that had "National" and the vertical stripe design together?

A. I don't recall any.

Q. You never saw one?

A. I don't recall any.

Q. You have had a rather wide experience in this field for a number of years?

A. That is right.

Q. But you did see plaintiff's, of course?

A. Yes.

Q. You are familiar with this Exhibit 15 enlarged?

A. Yes, but until called to my attention I didn't realize it contained vertical red and white stripes.

Q. You never saw a combination with "National" and vertical stripes like this in this field prior to this time?

A. I don't recall ever having, no.

Mr. Groen: That is all.

Mr. Mason: That is all.

(Witness excused.)

Mr. Mason: Mr. Fisher. [228]

PAUL TUCKER FISHER

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your full name, sir?

The Witness: Paul Tucker Fisher.

Direct Examination

By Mr. Mason:

Q. What is your business, Mr. Fisher?

A. I am a branch manager for Dean Van Lines in the Los Angeles area.

Q. How long have you held that position?

A. Since July 1, 1953.

Q. What are your duties?

A. The operations and administration of the business of Dean Van Lines in this area.

Q. Had you had any experience in the transfer and storage business prior to that time?

A. Yes, sir, my experience dates back to November of 1933 when I became associated with Bekins Van & Storage Co., and was associated with them from that time until 1951, when I became associated with Pierce Rodof of San Francisco for a period little in excess of a year.

I came with Dean Van Lines in, as I stated, July of 1953. [229]

Q. Are you somewhat familiar with the various transfer and storage companies operating in the United States?

(Testimony of Paul Tucker Fisher.)

A. Yes, from the standpoint of agencies which we enjoyed during the period of time I have been in this business.

Q. Have you observed their vans operating?

A. Yes.

Q. Do you know of any transfer and storage companies, other than the plaintiff National Van Lines, Inc., which uses the word "National" as a prefix to its name?

A. National Carloading Company is probably the most prominent and the oldest which engages in the movement of household goods, both by crated and uncrated method, throughout the United States.

National Movers, Incorporated, of New Jersey is one whose vans I have seen out here, and whose letterheads I have had occasion to see.

National City Transfer & Storage Co. of National City uses the name "National".

There are numerous other ones that have been mentioned, that I am not personally familiar with, that I have seen from time to time, either letterheads or vans.

Q. Do you know of any such companies which use the shield having vertical red and white stripes, such as that used by the National Van Lines?

A. The one that comes to mind most quickly is the [230] All-American Transfer & Storage.

Q. Where is that? A. Of Los Angeles.

Q. Any others?

A. That is the only one that comes to mind.

Q. Now, in the course of your work for the

(Testimony of Paul Tucker Fisher.)

Dean Van Lines, has it ever come to your attention that anyone, any member of the public was confused as between the plaintiff National Van Lines, Inc. and the defendant?

A. No, not in the sense that two firms were confused. Being in Government work where we are contractors, the people whose goods are being moved out here are often informed that the goods will come to us as the contractor handling the storage. As a consequence we have received calls asking the whereabouts of their goods being moved by many firms, not primarily or necessarily National Van Lines, but many other firms; North American Van Lines, Mayflower, and the like.

But there has been no question of any association that has come to my attention of the two names, of the similarity.

Mr. Mason: You may cross-examine.

Cross Examination

By Mr. Groen:

Q. How long did you say you were with Mr. Dean? A. From July 1, 1953.

Q. What was the total length of your experience in [231] this field of moving and storage?

A. From November of 1933.

Q. Did you work in various parts of the country? A. In California.

Q. California only? A. Yes.

Q. Did you ever see others in this field use a name or combination of words and indicia showing

(Testimony of Paul Tucker Fisher.)

"National" and the vertical stripes, besides plaintiff and defendant?

A. I believe that the only two that come to mind, other than All-American, are the two that have been mentioned, the plaintiff and the defendant.

Q. Does All-American use the word "National" with it?

A. No, I believe not; only the stripes.

Q. You don't know of anyone that uses "National" and the vertical stripe design, besides the plaintiff and the defendant? A. No.

Q. You said that with respect to some Government contracts that you did receive calls for or inquiries from the public about shipments from various lines over at defendant's office. How many calls on an average would you say you received a month or a week?

A. That would be difficult for me to answer, for the [232] company as a whole, because I haven't received them all. It is not unusual for us to receive such calls, because we have on the average of three to four vans of other companies calling at our warehouse daily, to discharge the goods belonging to personnel of the Government.

Q. Those are shipments then that they should send inquiries to you about.

A. Not necessarily, sir. The carrier actually was not Dean Van Lines. We were merely the receiving warehouse, by reason of having a contract.

Q. You had some connection with the shipment then?

(Testimony of Paul Tucker Fisher.)

A. Only upon receipt here. We have no knowledge of it prior to its arrival here.

Q. Did you ever have any, that is, any occasion to receive shipments that involved plaintiff, which came into your yards or your lot?

A. Yes, indeed, just as we have all the others. They enjoy traffic from the Government, just as all the other companies do.

Q. Whom were you with just prior to coming with Mr. Dean?

A. Immediately prior to that I did some special work for a gentleman in Oakland by the name of Jack Andrews with Checker Van & Storage. It was of a temporary nature.

Prior to that, with Pierce Rodof of San Francisco. [233]

Mr. Groen: That is all.

Mr. Mason: That is all.

(Witness excused.)

Mr. Mason: I have one more witness, your Honor, but I dismissed him at noon and he hasn't shown up. So I would like, in lieu of calling Mr. McKee, to offer his discovery deposition.

The Court: Received.

The Clerk: Defendant's OO.

(The document referred to was marked Defendant's Exhibit OO and was received in evidence.)

[See pages 415-494.]

Mr. Mason: Defendant rests, your Honor.

Mr. Groen: I would like to recall Mr. McKee for about two questions, and that is all I have.

The Court: If you just have that many, ask him from where he is. If you are really going to ask a number of questions, we will put him back on the stand.

Mr. Groen: He just stepped out to a phone. Would you see if you could find him?

Mr. Fihe: Yes.

Mr. Groen: If we may have just a moment, please. Your Honor, while we are waiting, I would like to make this suggestion: Could we withdraw the exhibits during the briefing time and use them? There are a lot of things we may want to look over. [234]

The Court: What about that, Mr. Mason?

Mr. Mason: I have no objection to it, your Honor. I have never done it in this jurisdiction. We do it in the East quite a bit.

The Court: It is agreeable with the court that an exhibit be withdrawn for use of counsel during the briefing time. But it will be a little awkward if you both want to look at the same time.

Mr. Groen: What is the procedure on briefs, simultaneous briefs?

The Court: I think it is better to have the plaintiff first and then the defendant, and then the plaintiff to answer.

Mr. Groen: In that event, could plaintiff withdraw the exhibits and then with the brief forward them to the defendant, and the defendant will have

them, and from there they can go back to the court.

Mr. Mason: That is agreeable.

The Court: I think they had better always be returned to the court, and let the party who is going to get them come to court and get them, so you don't have the possibility of a question of what was received.

Mr. Groen: Is it understood on the record when the transcript is written up that we may receive from the clerk all the exhibits and forwarded to us, so that I will have Mr. [235] Fihe, my local associate, take care of that.

When I am through briefing I will send them back to the court and Mr. Mason can withdraw them.

FRANK L. McKEE

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Groen:

Q. You examined Defendant's Exhibit MM, giving a tabulation of sales figures for the years 1944 through 1953, did you not?

A. Yes, sir.

Q. And you have heard Mr. Dean testify that about four per cent, roughly, of these gross figures were attributable to business that he booked for National Van Lines, isn't that right?

A. Yes, sir.

(Testimony of Frank L. McKee.)

Q. And that he remitted that to you?

A. Yes, sir.

Q. Now, you took one of those years at random, did you?

A. I took 1949 revenue, line haul revenue.

Q. And that figure, according to this exhibit, shows gross of $409,534.71, or roughly $409,000.00 as being the [236] gross for the year by Mr. Dean's company, is that right? A. That is right.

Q. Did you endeavor in the meantime to ascertain what the remittance by Mr. Dean's firm, the defendant, to your firm for the year 1949 was?

A. Yes, sir.

Q. What did you find?

A. I was given a figure by the Chicago office of $204,718.00.

Q. That you received from Mr. Dean during 1949.

A. That is the amount of line haul business that National Transfer & Storage turned in to National Van Lines, Inc.

Q. For that year. A. For that year.

Mr. Groen: That is all.

Cross Examination

By Mr. Mason:

Q. Do you know whether or not all of that was for the year 1949?

A. Yes, sir, that was taken off of the monthly statements for all 12 statements, totaling that figure.

(Testimony of Frank L. McKee.)

Q. And that was the gross business that he had booked for the National Van Lines?

A. Yes, sir, that was the line haul business.

Mr. Mason: That is all.

(Witness excused.)

Mr. Groen: I think both sides rest then?

Mr. Mason: Defendant rests.

Mr. Groen: Plaintiff rests, your Honor.

The Court: This case has been on our books for quite some time, so I don't suppose there is any need for great rushing in the briefing. Still we ought to get the case closed.

I would like very much to get it at issue on the law during the first quarter of 1955.

Mr. Groen: So would we.

The Court: What is your pleasure about briefing time?

Mr. Groen: May plaintiff have, say, 30 days after the delivery of the record?

The Court: All right. How much time do you want, Mr. Mason?

Mr. Mason: Well, I would like a like period.

Mr. Groen: May I have 10 days or 15 days for reply, if necessary?

The Court: All right. The order will be that the plaintiff will have 30 days from the date of delivery of the last of the transcript being transcribed within which to file an opening brief, and plaintiff may withdraw any or all of the exhibits for use in

connection with the preparation of the [238] brief; the exhibits to be returned when the brief is filed.

The defendant will have 30 days from the time that plaintiff's brief is received within which to file defendant's brief, and defendant will have a like privilege with respect to the exhibits and a like obligation to return them.

The plaintiff will then have 15 days within which to file a reply brief. And if a reply brief is not filed at the end of 15 days, the cause will nonetheless stand submitted at the end of the 15 days after receipt by the court of the defendant's brief.

Mr. Groen: Defendant will file something in reply, either a short brief or a statement. No further brief will be forthcoming.

The Court: Well, with that, I don't suppose you wish to argue the case orally today.

Mr. Groen: I would like to avoid that.

Mr. Mason: Counsel tells me he wants to catch a plane for the East.

The Court: All right, then, we will have the case submitted during the first quarter, assuming that the transcript can be speedily transcribed. I don't know just how many orders are ahead of you.

Mr. Groen: That is beyond our control.

The Court: All right.

(Whereupon, at 4:00 o'clock p.m., Friday, December 17, 1954, the hearing in the above-entitled cause was adjourned.) [239]

[Endorsed]: Filed Dec. 7, 1955.

PLAINTIFF'S EXHIBIT No. 48

[Title of District Court and Cause.]

DEPOSITION OF MARY R. MARTIN

Be It Remembered, that on Saturday, the 12th day of June, 1954, at 4:55 o'clock p.m., pursuant to Notice of Taking Deposition, at 85 Maitland Drive, Alameda, California, personally appeared before me, M. W. McGill, at notary public, Mary R. Martin, called as a witness on behalf of the plaintiff in the above entitled action.

Messrs. Wilkinson, Huxley, Byron & Hume, represented by Gerrit P. Groen, Esquire, appeared as attorneys for the plaintiff; and

Howard B. Turrentine, Esquire, C. P. Von Herzen, Esquire, and S. L. Laidig, Esquire, represented by John J. Whelan, Esquire, appeared as attorneys for the defendant.

The said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the deposition be reported by M. W. McGill, a duly certified reporter and a disinterested person, and thereafter transcribed into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated and that all objections to questions propounded to the said witness shall be

Plaintiff's Exhibit No. 48—(Continued)
(Deposition of Mary R. Martin.)

reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that M. W. McGill, a notary public in and for the City and County of San Francisco, State of California, might act as notary public.

MARY R. MARTIN

called as a witness on behalf of the plaintiff, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Mr. Groen: Q. Will you state your full name and address, Mrs. Martin?

A. Mary R. Martin, 85 Maitland Drive, Alameda.

Q. And that is California? A. California.

Q. And are you a housewife, Mrs. Martin.?

A. Yes.

Q. And how long have you lived here?

A. At this address?

Q. Yes. A. Since the first of February.

Q. And where did you live previously?

A. 1535 Pearl, Alameda.

Q. Mr. Martin is in the armed services?

A. Yes.

Q. And what is his rank? A. Captain.

Q. And it has been necessary for you to move

Plaintiff's Exhibit No. 48—(Continued)
(Deposition of Mary R. Martin.)

from time to time because of Captain Martin's travels? A. Yes.

Q. And were you moved at one time by National Transfer & Storage Company? A. Yes.

Q. Will you tell us when that was, approximately?

A. It was in September, two years ago—it will be two years this September.

Q. And from where to where did you move at that time?

A. They picked it up in storage in San Diego and brought it here to 1535 Pearl.

Q. And "they" is National Transfer & Storage Company? A. Transfer & Storage, yes.

Q. And did you have reason to complain about that particular movement that they handled for you?

A. Yes, I did, for the simple reason that——

Q. Well, just answer the question first. You did have some reason to complain? A. Yes.

Q. And what did you do and where did you call with respect to that complaint?

A. I called—I looked in the telephone book under National, and I called San Francisco, thinking that would be the head office, and they informed me that they didn't have——

Q. Who did you call?

A. National Van.

Q. You know you are saying National Van and not National Transfer? A. Yes.

Plaintiff's Exhibit No. 48—(Continued)
(Deposition of Mary R. Martin.)

Q. All right. Proceed, please.

A. And I assumed National—I should have taken more time to look on the papers that I had and called National Transfer, but National—I called National Van in the telephone book.

Q. And you called National Van, then, in San Francisco? A. Yes.

Q. And what did you tell them?

A. I told them that wanted to talk to Mr. Green, I believe, and that I wanted to put in a complaint about the move, and a girl that I talked to there said that she didn't think they had moved me, and I said, "Well, I am sure that you did," and so she checked and said, "No, the Mr. Green you want is Mr. Green of National Transfer."

Q. Did you tell her what you wanted at the time?

A. No,I just wanted to talk to Mr. Green, and then I looked up in the telephone book and found there was a National Transfer & Storage.

Q. At that time did you also note that besides the name National there was an insignia or design associated with the name National?

A. In the telephone book?

Q. Yes, that is the classified. That is what you looked at?

A. Yes, that's what I looked under; yes. I don't recall.

Q. Do you recall that you told National Van

Plaintiff's Exhibit No. 48—(Continued)
(Deposition of Mary R. Martin.)

when you called them in error the first time what your complaint was?

A. I don't think I did.

Q. You don't remember?

A. I don't remember, and I am sure I didn't. When the name Green was brought up, she told me I wanted the other company.

Q. You say "she." Was it possible you talked to a man there?

A. No, it was a woman.

Q. And you don't know who it was?

A. No.

Q. And she told you to call National Transfer & Storage? A. That's right.

Q. What was your complaint against National Transfer?

A. Well, over things that were lost and the way that they handled the move when they brought me in—moved me into the residence.

Q. Would you explain that a little more fully?

A. The things were in storage, and they were stored—they were picked up from the residence in San Diego by one company, and I believe the name was Heck, and then National Transfer picked it up from Heck's Storage and brought it up, and everything that I complained about the men shrugged their shoulders and said, "We didn't do it; Heck did," and when you are getting the complete runaround and you are alone—my husband was in Japan at that time, also—why, there wasn't much

Plaintiff's Exhibit No. 48—(Continued)
(Deposition of Mary R. Martin.)

I could do about it, but when things turned up missing, such as a television antenna pole that we had used in the desert, which is, I think, forty feet, and it telescopes. You know the kind I am referring to?

Q. Yes.

A. And they are quite expensive, and thinking that we would in time be back in a zone where we will need a large antenna like that, I naturally wanted it, and I asked them where it was, and they said they didn't know, and they also brought my clothes in in boxes, and that included wardrobes, and they laid them on the davenport; they did not take them upstairs and put them in the closet, and I had been moved and unpacked before, and that is customary to put them in the closet.

Q. In other words, you had a complaint about the type of service? A. Yes.

Q. And with that in mind, you first called National Van Lines? A. Yes.

Mr. Green: Your witness.

Cross Examination

Mr. Whelan: Q. Mrs. Martin, as I understand it, your goods were transferred from San Diego to 1535 Pearl Street? A. Yes, sir.

Q. And the company that delivered it to that address was National Transfer & Storage Company? A. Yes.

Q. Did they give you any papers to sign?

Plaintiff's Exhibit No. 48—(Continued)
(Deposition of Mary R. Martin.)

A. Yes.

Q. And how long after the goods were delivered did you call up the National Van Lines and make this complaint?

A. This was within—they delivered the goods on Saturday, and this was Monday, and I did not sign the papers that the driver wanted me to sign when the furniture was delivered because of the loss and difficulty in service and their rudeness, for one thing.

Q. When you called National Van Lines, you were assuming that the people who had delivered the goods to you had their head office in San Francisco? A. Yes, I was.

Q. And you did not look in an Oakland directory?

A. Well, I looked in the Alameda directory that I had, which included Oakland, and I believe that National Van has their San Francisco number in there, if you'd care to look.

Q. When you called National Van in San Francisco—National Van Lines in San Francisco, you talked to a woman in the office? A. Yes.

Q. And you explained what your problem was and everything else? A. Yes.

Q. You are sure it was a woman?

A. Well, if I know a woman's voice, it was a woman. Of course, I could be fooled on that.

Q. Then you subsequently contacted National Transfer & Storage Company? A. Yes.

Q. In Oakland?

Plaintiff's Exhibit No. 48—(Continued)
(Deposition of Mary R. Martin.)

A. Yes. This time I was more diplomatic. I asked if they had moved Martin to this address.

Q. When you first called National Van, you didn't ask if they had moved you?

A. No, I called with hell and fury popping out of both mouth and eyes.

Q. You mentioned that you were calling for a Mr. Green? A. Yes.

Q. Where did you get the name Mr. Green?

A. From the drivers.

Q. From the drivers?

A. Yes—or the driver.

Q. The driver. They didn't make any mention to you that Mr. Green was with National Van, did they?

A. No, I assumed that Mr. Green was head of National Transfer & Storage office that they worked out of. I mean I didn't realize whether it was in Oakland or San Francisco.

Q. Was there anything on the receipt that you were given to sign, which you didn't sign, that indicated San Francisco or Oakland, as you recall?

A. No, sir, I don't recall.

Q. There was nothing on that receipt, as you recall, that said National Van Lines?

A. No, sir, I don't.

Mr. Whelan: I have no further questions.

Mr. Groen: That is all. Deposition is closed.

/s/ MRS. MARY R. MARTIN

Plaintiff's Exhibit No. 48—(Continued)

(Deposition of Mary R. Martin.)

State of California,

Northern District of California,

City and County of San Francisco—ss.

I hereby certify that on Saturday, the 12th day of June, 1954, at 4:05 o'clock p.m., before me, M. W. McGill, a notary public, at 85 Maitland Drive, Alameda, California, personally appeared pursuant to Notice of Taking Depositions, Mary R. Martin, called as a witness on behalf of the plaintiff; and Messrs. Wilkinson, Huxley, Byron & Hume, represented by Gerrit P. Groen, Esquire, appeared as attorneys for the plaintiff; and Howard B. Turrentine, Esquire, C. P. Von Herzen, Esquire, and S. L. Laidig, Esquire, represented by John J. Whelan, Esquire, appeared as attorneys for the defendant; and the said Mary R. Martin being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, deposed and said as appears by her deposition hereto annexed.

And I further certify that the said deposition was then and there reported by me, a duly certified reporter and a disinterested person, and was transcribed by me; and I further certify that at the conclusion of the taking of said deposition, and when the testimony of said witness was fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him in my presence, and that the deposition is a true record of the testimony given by said witness.

Plaintiff's Exhibit No. 48—(Continued)
(Deposition of Mary R. Martin.)

And I further certify that the said deposition has been retained by me for the purpose of securely sealing it in an envelope and directing the same to the clerk of the court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal, this 28th day of June, A.D. 1954.

[Seal] /s/ M. W. McGILL,
Notary Public

[Endorsed]: Filed June 29, 1954.

PLAINTIFF'S EXHIBIT No. 49
DEPOSITION OF ROBERT W. ADAMS

[Title of District Court and Cause.]

Be it remembered, that on Saturday, the 12th day of June, 1954, at 1:30 o'clock p.m., pursuant to Notice of Taking Depositions, at Room 485, St. Francis Hotel, San Francisco, California, personally appeared before me, M. W. McGill, a Notary Public in and for the City and County of San

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Francisco, State of Califonia, Robert W. Adams, called as a witness on behalf of the plaintiff in the above-entitled action.

Messrs. Wilkinson, Huxley, Byron & Hume, represented by Gerrit P. Groen, Esquire, appeared as attorneys for the plaintiff; and

Howard B. Turrentine, Esquire, C. P. Von Herzen, Esquire, and S. L. Laidig, Esquire, represented by John J. Whelan, Esquire, appeared as attorneys for the defendant.

The said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the deposition be reported by M. W. McGill, a duly certified reporter and a disinterested person, and thereafter transcribed into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

Mr. Groen: These depositions are taken pursuant to notice, served upon counsel for defendant May 28, 1954.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

ROBERT W. ADAMS

called as a witness on behalf of the plaintiff, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

Mr. Groen: Q. Will you please state your full name and address, Mr. Adams?

A. Robert W. Adams.

Q. Where do you reside?

A. 670 Lombard Street, San Francisco.

Q. What is your occupation?

A. Claims adjuster for Bekins Van & Storage.

Q. How long have you been in that capacity?

A. Nine months.

Q. What were you doing prior to that?

A. Prior to that I was with Peters & Sons on a temporary basis?

Q. And prior to that?

A. With National Van Lines.

Q. How long were you with National Van Lines?

A. Approximately six years.

Q. Will you briefly describe your duties during that period with National Van Lines?

A. Yes. I started off as a billing clerk in Los Angeles, and was transferred to San Francisco in March of '49, where I did dispatching and later

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

office manager and, then, later manager for the San Francisco bay area.

Q. About how many people, on the average, were there in the San Francisco office of National Van Lines? A. I'd say it varied——

Mr. Whelan: Pardon me. At what time?

Mr. Groen: Q. During this period of your employment.

A. One time there was six. It varied between five and six.

Q. And were you familiar with all major matters that occurred in the office at that time?

A. Yes.

Q. Are you familiar with the National Transfer & Storage Company? A. Yes.

Q. And are they in San Francisco?

A. No, they are in Oakland.

Q. Do they operate around this general area?

A. Yes, they do, extensively.

Mr. Whelan: Would you read that last answer back to me?

(Answer read by reporter.)

Mr. Groen: Q. Do you know whether or not National Transfer & Storage was at one time agents for National Van Lines, Inc.?

A. Yes, they were.

Q. And were they agents for National Van Lines, Inc., at the time you began your employment with National Van Lines?

A. Yes, they were.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Q. And did you have much contact with National Transfer & Storage Company? A. Yes.

Mr. Whelan: I'd like to object to the form of that question and the answer, and ask you if you would mind asking just what he knows about it.

Mr. Groen: Well, that will develop.

Mr. Whelan: Yes.

Mr. Groen: Off the record.

(Unreported discussion.)

Mr. Groen: What's the last on the record?

(Record read by reporter.)

Mr. Groen: Q. Will you explain what that contact was with National Transfer & Storage, what the character of it was?

A. It was in connection with orders which they would be taking for National Van Lines as an agent for National Van Lines: The arrangement of dispatch, arrangement of packing. Sometimes it dealt in questions on their statement or incoming shipment which they might have booked for National that were coming from the east.

Q. Now, that was at the time they were official agents for—— A. That's right.

Q. ——National Van?

A. That's right.

Q. And that contact, I take it, was frequent, a daily occurrence or——

A. Daily, sometimes five and six times a day, yes.

Q. Are you familiar with the fact that the con-

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

tract of the agency with National Storage was cancelled? A. Yes.

Q. Do you remember roughly when that was?

A. I believe February, 1950.

Q. Did you still have any occasion to contact National Storage, or they to contact you, since that time? A. Yes.

Mr. Whelan: May I ask you to bring out one point: When did he leave National Van Lines?

Mr. Groen: Q. When did you leave National Van Lines? A. In May of 1953.

Mr. Whelan: O.K.

Mr. Groen: Q. What was the nature of the contacts you had with National Storage, or National Storage with you, after the termination of the agency agreement which you indicated was around February of 1950?

A. Telephone calls in connection with customers that would call in and be under the impression that they were—had called National Transfer & Storage, and we would——

Mr. Whelan: Well, I am going to make a motion to strike that answer on the ground that it's very ambiguous.

Mr. Groen: We will develop it.

Mr. Whelan: And not responsive.

Mr. Groen: Let him finish his answer.

Q. What was the nature of those calls?

A. They resulted from calls coming into our

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

office that were intended for National Transfer & Storage.

Q. How do you know they were intended for National Transfer & Storage?

A. When the people called in, either for a complaint or to check for service, we'd ask their name and find that, in checking our records, we had no order for them or had no record——

Q. Then what would you?

A. ——of their name. Then, in questioning the person who had called in, we would find that they were under the impression they were calling National Transfer & Storage.

Q. Did you know then they were really trying to get in touch with National Transfer instead of National Van?

A. Yes, we would. In many instances, they would—we would call National Transfer and ask them if they had records of such a shipment or customer, and they would say yes, and we would tell the party to get in touch with National Transfer or have National Transfer call the party direct.

Q. Did that happen very frequently?

A. Yes, it did.

Q. And did that happen continuously until you left the employ of National Van, to your knowledge? A. Yes, it did.

Q. And those occasions were always brought to your attention, or you were a party to the transactions? A. Yes, definitely.

Plaintiff's Exhibit No. 49—(Continued)
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Q. And did you ever get calls from National Transfer at your office at National Van regarding any calls that they may have had for your office?

A. Would you ask that again?

Mr. Groen: Would you repeat the question, please?

(Question read by reporter.)

The Witness: Once or twice.

Mr. Groen: Q. Who did you deal with at National Transfer, if you recall, since the termination of this agreement? A. Mr. Green.

Q. Any one else?

Mr. Whelan: Mr. who?

Mr. Groen: Green.

The Witness: Green. No.

Mr. Whelan: Did I understand that his answer is the only man he dealt with was Mr. Green?

Mr. Groen: Yes.

Q. You don't recall any others now?

A. I don't recall any at the moment.

Q. Mr. Green was in charge of National Transfer's office here, to your knowledge?

A. To my knowledge at that time, yes.

Q. Did you make any records or memoranda regarding calls from customers, or others, regarding incidents of confusion or mistake?

A. Yes, I did.

Q. Did you keep records of all of them or——

A. No, at first we didn't, because we hadn't thought of it, but when they came in such numbers

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that we thought it would be wise to record each one of them.

Q. Now, I am going to hand you a few of those memoranda to——

Mr. Whelan: May I see them first?

Mr. Groen: Just a moment.

Q. (Continuing): ——refresh your recollection as to some of these incidents and ask you if you are familiar with them, and if so, whether you will tell us the details surrounding them as you recall them personally?

Mr. Whelan: Before you question him, Mr. Groen, may I look at them a second?

Mr. Groen: Just a minute.

(Mr. Whelan examines documents.)

Mr. Groen: Q. What is the memoranda you have there?

A. (Examining document.) This is in connection with a call that we received from a Mr. R. C. Allen. He was asking for Mr. Green, who works for National Transfer & Storage. Mr. Allen had sold him some cartons—or had sold National Transfer some cartons, and was inquiring to see if they would like to purchase some more.

Q. And do you personally recall that incident?

A. Yes, I do.

Q. Do you know what you did with the inquiry?

A. We informed him that Mr. Green was with National Transfer, and gave him National Transfer's number.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Q. I hand you another memorandum purporting to come from your office, and ask you if you will look at that and advise if that refreshes your memory about another incident of this character?

A. (Examining document.) Yes, it does.

Q. What are the——

A. This is a case where the mail brought a letter addressed to National Van Lines at our address, and the invoice inside was for National Transfer & Storage in connection with some fibre drums that they had purchased.

Q. What did you do with it, if you recall?

A. We put it in another envelope and forwarded it to National Transfer.

Q. I have handed you another memorandum and ask if you are familiar with the details expressed therein?

A. (Examining document.) Yes, this is in connection with a woman who called in regard to the crating of her shipment for overseas.

Q. Is her name given?

A. Yes, Mrs. Reiss, R-e-i-s-s.

Q. And do you remember that incident yourself?

A. Yes, I do; and National Transfer & Storage had the crating contract for the navy.

Q. Do you remember what you did with that?

A. Yes, I gave her the telephone number for National Transfer, had her contact them.

Q. Here is a memorandum dated June 30, '52, regarding a claim from a P. G. Slattery, and I

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will ask you to look at that memorandum and see if that refreshes your recollection about that incident?

A. (Examining document.) Yes, this is in connection with a call we received from Bekins in Oakland, and Bekins had delivered the shipment which had been in storage at National Transfer & Storage's warehouse, and the customer had filed a claim, and Bekins was trying to get in touch with National Transfer & Storage to settle the claim for the customer and find out just where the liability laid as to her claim, and they called National Transfer—rather, National Van Lines, thinking they were getting in touch with National Transfer & Storage.

Q. Is Bekins another transfer company in Los Angeles? A. Yes.

Q. In this area?

A. They are; which means even within the industry, itself, is confusing.

Mr. Whelan: I am going to object to that last answer, Mr. Reporter, and ask it be stricken as not responsive.

Mr. Groen: Q. Here is another memorandum dated March 5, 1952, and I will ask that you look at that and tell us what, if anything, it contains that refreshes your memory as to similar incidents?

A. (Examining document.) Yes, this is a call from Camp Stoneman in connection with a shipment coming in from the east for Sergeant Gersatoness. They wanted to know when it would be in,

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and we had no record of it, so we teletyped our Los Angeles dispatch to see if they had any record of it, which they didn't. We later learned that the shipment was coming in via Howard Van Lines.

Mr. Whelan: Now, I am going to object to any further testimony on this line unless you are answering a question, Mr. Adams. Now, you said they "learned." I'd like to know if he learned.

The Witness: Pardon?

Mr. Whelan: You said you later learned it must have ended up in National Storage. I want to find out if that is just hearsay, or did you, yourself, personally find out?

The Witness: No, we did find out that the shipment was coming through Howard Van Lines by the transportation office at Camp Stoneman.

Mr. Groen: I think we should bear in mind that Mr. Adams has testified he was in charge of that office, and it was a small office, just a few people, and he knew about all these things personally as they occurred.

The Witness: That's right.

Mr. Groen: Q. Is there any other comment about that incident? Do you know what happened to it, how it was finally adjusted?

A. Yes. The transportation office finally checked back through their own channels to the east and clarified the matter; so that they did get in touch with National Transfer.

Q. Here is another such memorandum dated the

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3rd of March, 1952. I will ask you look at that and explain if there's anything in there that you are personally familiar with that this refreshes your memory on.

A. (Examining document.) Yes, this is in connection with a lady who called in and wanted to speak to a Mr. Green, and we told her——

Q. Called in to where?

A. Called in to the National Van Lines office and asked for Mr. Green. We told her we didn't have a Mr. Green, and she said, "Well, he is the dispatcher there," which, knowing that Mr. Green is—was with the National Transfer & Storage and——

Q. Did you know that personally, that he was with National Transfer?

A. Yes, I did. And I also knew personally that he was dispatcher over there, or did a certain amount of dispatching, and I gave the lady the telephone number for National Transfer.

It also concerns a call from Mrs. Higbee. She wanted to know when the drivers would be at her residence to load the furniture, and we checked our records and found that we had no such shipment, and we then called National Transfer & Storage, and they told us that the—their records had the—I should say the shipment was on record in their office.

Q. Here is another memorandum, Mr. Adams, regarding a conversation with a Mrs. J. W. Roddy.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Will you look at that, and tell us if that's familiar to you, and if so, explain what it involves?

A. (Examining document.) Yes, Mrs. Roddy called in and wanted to know when her goods were going to be delivered. They had been picked up two weeks ago in San Diego, and we found that we had no record of Mrs. Roddy's shipment, and knowing that National Transfer & Storage does have an office in San Diego, we contacted the National Transfer & Storage and found that the shipment was coming in on their van.

Q. Here is a memorandum concerning some alleged confusion with a Mrs. J. I. McDaniels in September, 1952. Will you look at that memorandum and tell us what you know about that incident, if you recall it?

A. (Examining document.) Yes, this is for Mrs. McDaniels, who was calling in to cancel an order for moving to San Diego that she had placed, and we checked our records and found that we didn't have any such order, and we called Mrs. McDaniels back, and through questioning her, we found that she was actually trying to get in touch with National Transfer & Storage.

Q. You remember that incident yourself?

A. Yes, I do.

Q. And do you remember what the sequel was, or the ending?

A. Yes, she got in touch with National Transfer

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& Storage. She didn't realize that there was a difference between the two.

Q. In incidents of this kind did you also advise National Transfer about these calls even though you might have told the customer that they were calling the wrong number?

A. Yes, we did. I wouldn't say in all cases.

Q. Was that rather common practice?

A. Yes, it was.

Q. Here is a memorandum dated August 29, 1952, from the San Francisco office. I will ask you to look at that and see if that refreshes your memory on similar incidents, and if so, explain what occurred.

A. (Examining document.) Yes, this is in connection with an order for moving Captain Wild, which was from the Presidio of San Francisco, and he called in, wanting to know when the van was going to be out to pick up his goods, and there again we checked our records and found we had nothing concerning his shipment, and checking with Presidio, we found that the order was being handled by the National Transfer & Storage.

Q. Here is a memorandum dated 8/28/52, regarding a purported inquiry by a Colonel Lightbody. Look at that, please, and tell us what you remember about that, if anything.

A. (Examining document.) Yes, Colonel Lightbody called in and wanted to know when he might

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expect delivery of his shipment which was coming in from Paso Robles. We didn't have any record of such a shipment, and knowing that National Transfer has an office in Paso Robles, or did, we called them and checked with them in connection with the shipment, and found it was being hauled by National Transfer & Storage.

Q. Here is a memorandum dated September 2, 1952, regarding an inquiry of a certain F. C. Arnold. Look at that, please, and tell us what it is, if you know, and explain the circumstances as you may recall them.

A. (Examining document.) Yes, Mr. Arnold called in and wanted to know when we were going to take care of settling his claim, and he gave us the delivery date of his goods, and we checked our records and found that we had nothing for Mr. Arnold.

Q. What kind of a claim was it?

A. It was a damage claim.

Q. That occurred in shipping?

A. In shipping, that's right. And through further discussion and questioning with Mr. Arnold, we found that he had actually been moved by National Transfer & Storage.

Q. Here is a memorandum of September 15, 1952, with respect to a certain complaint of a Mrs. William E. Martin, of Alameda. Look at that and tell us what you know about it, if anything.

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A. (Examining document.) Yes, this was from a Mrs. Martin of Alameda. She called in to the office and was quite irate over the moving—the men that had been doing the moving were rude—and the damage that had been done to her furniture in transit from San Diego. She said — she mentioned Mr. Green, and we knew that he worked for National Transfer, and so we referred her to the National Transfer & Storage.

Q. Here is a memorandum of January, 1952, which appears to be about a Stokely Foods incident. Do you recall the incident described in that memorandum?

A. (Examining document.) Yes, I do.

Q. Will you tell us about it, please?

A. Yes. This is in connection with a Mr. Hutto, and he was an employee of Stokely Foods, and the Stokely Foods were paying for his move, and the order had been placed by him through his traffic manager.

Q. The traffic manager of Stokely?

A. Yes, of Stokely Foods, and Stokely Foods' traffic manager told him to get in touch with Mr. Allen of National Van Lines, and Mr. Hutto, who lived in Hayward, called the National Transfer and asked for Mr. Allen, and he was told that Mr. Allen did not work there any longer, and he proceeded to place his order with them. Then, on the day of moving National Transfer's van was late, and——

Q. How did you know it was late?

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A. We knew because he called his traffic manager to complain that the van was not there on the time that had been scheduled for, and——

Q. "He" refers to the man at Stokely?

A. Mr. Hutto called the traffic manager of Stokely, and the traffic manager at Stokely Foods told him to call Mr. Allen, and Mr. Hutto said that Mr. Allen was no longer with National.

Q. Were those facts related to you subsequently?

A. They were, definitely. And the traffic manager told Mr. Hutto that Mr. Allen was with National Van Lines, and gave him Mr. Allen's telephone number, which was, of course, National Van Lines' phone number here in San Francisco, and Mr. Hutto called in, and it was through that telephone call that we got all of this information in connection with the confusion that he had experienced, and through talking with him—he found that he had gone to the wrong company—we found that he'd actually been trying to get in touch with us to place his order.

Q. How do you know that?

A. Well, he'd called National Transfer, thinking it was National Van Lines. He was told that Stokely was paying the bill, and the bill was supposed to come to National Van Lines.

Q. Had National Van Lines worked for Stokely before?

A. Yes, it was an account of National Van Lines.

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Q. Was it a regular account of National Van Lines?

A. Yes, it was. And in any case, Mr. Hutto asked if we could have a van over there, which we checked and found that we could and told him we would have one over there within two hours, and he said he was to move with National Van Lines, and he would like to have us come over and pick up his goods as soon as possible, which we did, and he in turn called National Transfer & Storage and cancelled the order with them.

Q. Who had really placed the order for Mr. Hutto; was it the traffic manager of Stokely?

A. The traffic manager of Stokely told Mr. Hutto to contact Mr. Allen. You see, Mr. Allen called on the traffic manager of Stokely frequently and——

Q. Mr. Allen was in your employ, or with National Van Lines? A. That's right.

Mr. Whelan: Now, for this record I want to object to the last answer on the grounds that it's hearsay.

Mr. Groen: Q. Let's proceed, then. Mr. Allen of National Van Lines called upon Stokely, you said, to get these facts straight?

A. That's right.

Q. And that was a common occurrence?

A. That is right.

Q. And National Van had been moving for

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Stokely regularly as one of the regular accounts?

A. That's right.

Mr. Whelan: Let me interrupt. The last answer, the one before this, I want to put in an objection on the ground of hearsay.

Mr. Groen: Q. You, personally, know that National Van had been servicing the account of Stokely? A. Yes, we had.

Q. And you say the traffic manager knew Mr. Allen of National Van Lines?

A. The traffic manager knew Mr. Allen of National Van Lines. In fact, the traffic manager later got in touch with Mr. Allen and confirmed the fact that the shipment was to have gone to National Van Lines.

Mr. Whelan: Objected to on the ground of hearsay.

Mr. Groen: Q. How did—Mr. Hutto, was it?

A. Hutto, yes.

Q. How did Mr. Hutto come finally to get the proper number of Mr. Allen?

A. He got it from the traffic manager at Stokely Foods.

Q. Then, as I understand it, Mr. Hutto placed order for the shipment, himself, on the advice of the traffic manager of Stokely, is that right?

A. That is right.

Q. And he called National Storage instead of National Van? A. That is right.

Q. Is that it? A. That is right.

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Q. And he asked for Mr. Allen at National Storage?

A. Yes, he did. And how it developed was: The traffic manager at Stokely Foods had given Mr. Allen's business card to Mr. Hutto, and Mr. Hutto lost the card. Then he checked in the telephone directory, trying to call to get in touch with Mr. Allen, and he got the National Transfer & Storage people, and they told him that Mr. Allen no longer worked there.

Q. And this was later reported to you by Mr. Hutto?

Mr. Whelan: Wait a minute. On that last answer, I want to put in an objection as to hearsay and make a motion that the answer be stricken.

The Witness: That wouldn't be hearsay, because he told me——

Mr. Whelan: My objection is just for the record, Mr. Adams. If Mr. Groen wants to straighten it out, it's all right.

Mr. Groen: Q. Did Mr. Hutto report that personally to you?

A. Yes, he did, on the telephone.

Q. And you were directly involved in this whole incident, this whole confusion?

A. Yes, I was. I had talked personally to Mr. Hutto.

Q. And Mr. Hutto did report to you about his original contact with National Transfer?

A. That's correct; all of this took place in a

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telephone conversation between myself and Mr. Hutto.

Q. And, as I recall, then, the order was initially given to National Transfer, but when the confusion became apparent, National Van finally got the order?

A. That is right. Mr. Hutto was of the impression that he was being moved by National Van Lines.

Q. Here is a letter to International Harvester from your office, dated January 11, 1952. Will you look at that and explain what that represents, if you know?

A. (Examining document.) Yes, this was for a statement that came in through the mail from International Harvester Company.

Q. Came in to who?

A. Came in to National Van Lines. We checked our purchase order book and found that we had not placed any order with the International Harvester Company, and we returned it to them, and were reasonably certain that it belonged to the National Transfer & Storage.

Q. And did you ever find out where it really did belong, whether it was theirs?

A. No, other than the fact that it was never returned to us after we mailed it back to them.

Q. Here is a copy of a letter to Transport Clearings, San Francisco, from your San Francisco office, purportedly written by you on 3 March 1952.

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Will you look at that and explain that, if you are familiar with it?

A. (Examining document.) Yes, this is for an invoice in the amount of $34.82 which was received from the Transport Clearings at our National Van Lines office. Not having an account with Transport Clearings from San Francisco, we assumed the bill must be National Transfer & Storage's, which I, personally, knew that they did do business with Transport Clearings, and we returned the invoice to them.

Q. You heard nothing from them, I take it?

A. No.

Q. I am handing you a memorandum dated 16 July 1952, which purports to have your name on it, and a letter to National Van Lines from the Post Transportation Officer from Presidio, dated 11 July 1952, and a copy of a letter to the Post Transportation Office, Presidio, from a Mrs. Ellen Shimasaki. Will you look over those three documents referred to and tell me whether or not you are familiar with the matter expressed therein and the incident? Do you remember that?

A. (Examining document.) Yes, this was in connection with a letter that had been written to the Transportation Officer at Presidio by Mrs. Shimasaki involving a claim that she had filed with the National—she says in her letter, "National Van Lines of Oakland," and the Transportation officer at Presidio sent it to National Van Lines' office

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here in San Francisco, and in checking we found that we never moved a Shimasaki to Fort Bragg, North Carolina, or we had no record of that name in our files, and we checked back with the Presidio and found that the order had actually been handled by the National Transfer & Storage in Oakland.

Q. You, personally, checked that material?

A. Yes, I did.

Q. And how was that concluded?

A. The letter was returned to the Presidio, and they in turn sent it to National Transfer & Storage.

Q. Now, in connection with all these memoranda which we have reviewed and to which you have just testified, I notice that some have the name "L. Erspan" and some "Bob Adams," as being the source. Who was L. Erspan?

A. She was general clerk in the office.

Q. Did she work under your jurisdiction?

A. Yes, she did.

Q. Was she a typist? A. Yes, she was.

Q. And whether your name appeared on these memoranda or her own, did you always know about these memoranda?

A. Yes, I did in most cases. We were quite busy, and there were not very many people in the office, and in most cases I made notes on scratch paper, and she later typed them up for me and sent them.

Q. And just transmitted those——

A. That's right.

Q. Were these memoranda prepared in the re-

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gular office routine? A. I beg your pardon?

Q. Were these memoranda prepared as a matter of regular office routine at the time?

A. Yes, they were.

Q. And you indicated before that you didn't keep records of all incidents, is that true?

A. That is true. There were many before we started, and even after we started, it wasn't possible to record every one of them. You'd be—being busy, we sometimes wouldn't have the opportunity to get them all on the memo.

Q. How did you handle, say, the average, ordinary inquiry that just came by phone if it could be disposed of readily?

A. Well, if it were apparent at the outset of the conversation that they had contacted the wrong party, we would have them call National Transfer. Those were cases where it wouldn't get involved, and if we didn't get involved, then we merely gave them National Transfer's telephone number.

Q. Now, you indicated that that happened continuously throughout your employ after the agency relationship with National Transfer was terminated? A. Yes, it did.

Q. And do you know whether National Transfer placed advertisements right along with National Van in the telephone directories locally here and other books? A. Yes, they did.

Q. They did? A. They did.

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Q. Did they frequently appear right together, to your knowledge?

A. Yes, in the telephone directory.

Q. Was there anything besides the name "National" that was similar between the two source designations?

A. Yes, they used an outline of the United States with the bottom half in red and white stripes, which is very similar to the National Van Lines' emblem, which carries the same stripe.

Q. And was that emblem containing the red and white stripes that National used similar in appearance to the emblem that National Van used?

A. I would say yes, it was. I think in looking—if you were to glance at the two of them casually, I think you could easily mistake the National Transfer emblem for the National Van Lines', or vice versa.

Q. Now, when reproducing these emblems or names of the respective organizations—that is, National Van and National Transfer—did the alternate red and white stripes come out usually black and white?

A. That's right, in the telephone directory. Of course, in the telephone directory, I think your advertising is mainly for eye catching, and there's where I think a good deal of the confusion came in, because in thumbing through the moving section, a person could easily glance and see these stripes and think, well, that is National Transfer and look at

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the telephone number and call it, not being concerned further than that that they weren't actually getting the company they thought they were.

Q. Do you recall whether National Transfer used the emblem with the alternate red and white stripes on their trucks and stationery and advertisements.

A. They used it on their trucks. I believe they used it on their stationery; however, I am not sure.

Mr. Groen: Read back the previous answer that the witness gave, please.

(Answer read by reporter.)

Mr. Groen: Q. Did you mean a National Transfer or National Van there?

Mr. McKee: Which did you mean?

Mr. Whelan: I am going to object if the president of National Van Lines is going to intervene here. I don't think he is a party.

Mr. Groen: He hasn't said anything. I am asking the questions.

Mr. Whelan: But he started——

Mr. Groen: Make a record.

Q. Do you understand the question?

A. No, I don't.

Mr. Groen: Go back where you were reading and read before that again.

(Answer re-read by reporter.)

Mr. Groen: Q. Did you mean National Transfer or National Van there?

A. I meant National Van Lines.

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Mr. Groen: I think that's obvious in the record, but I wanted to make certain before we get away.

Q. Now, with respect to all these memoranda which we have been testifying about and the copies of the letters, these are photostatic copies, are they not? A. Yes, they are.

Q. Is there any question in your mind that those are true reproductions of the originals?

A. None whatever.

Q. You have seen the originals?

A. Yes, I have.

Q. They are just copies of letters that were in your possession? A. Yes, sir.

Q. And these are true photostatic copies, as far as you know? A. Yes, they are.

Mr. Groen: The memoranda and copies of letters referred to by the witness, marked "A" through "S", respectively, are offered on behalf of plaintiff as part of the Adams' deposition.

Inter-Office Memorandum "A"

[Stamped]: July 3-52-2:30 p.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 7/1/52.

Mr. R. C. Allen of Business Machines, 571 Market St., San Francisco, called this office for Mr. Green. Mr. Green works for National T/S.

Mr. Allen sold some cartons to them sometime ago and wanted to know if they wanted more. We

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)
gave him the telephone number of National T/S.

Inter-Office Memorandum "B"

[Stamped]: July 11-52-2:30 p.m.

To Louis Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 7/10/52.

We received in the mail this AM a triplicate statement for the above company for 59 fibre drums @ $1.25 ea—73.75.

We forwarded to National T/S.

[In longhand]: Statement sent to NVL by mistake.

Inter-Office Memorandum "C"

[Stamped]: July 17-52-2:30 p.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National Transfer & Storage Co. Date 7/16/52.

We received a call today from a Mrs. Reiss regarding the crating and shipment of her household goods for overseas.

The National T/S has the crating contract for overseas shipments.

Inter-Office Memorandum "D"

[Stamped]: June 30-52-10:30 a.m.

To Lou Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 6/28/52.

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(Deposition of Robert W. Adams.)

Mr. F. L. McKee has requested this office to report to you all called that we received at this office that belong to the National T/S in Oakland, Calif. On 6/27/52 we receive two calls directed to them.

1. Bekins Trans. in Oakland called us regarding a claim for P. G. Slattery. The lot was in storage @ National T/S. having gone into their whse. on 2/25/52 and evidently delivered to residence on 6/26/52 by Bekins.

2. Call received by this office for an employee by the name of Mr. Rodney. This man is an employee of National T/S.

Inter-Office Memorandum "E"

[Stamped]: Mar. 5-52-2:30 p.m.

To Lou Hobmann—Chicago.

Camp Stoneman called regarding a shipment of goods from Ft. Dix, N. J. for Sgt Ben Gersatoness. In checking the information it was necessary to Teletype Los Angeles and call Camp Stoneman back. This cost us about $2.00 in communications cost. It was learned that the shipment was coming in via Howard Van Lines, for whom National Transfer and Storage are Agents.

We had a call from a lady called for John Hatton, National Transfer & Storage. This lady knew the company she was calling, but because of the similarity of names did not notice the difference.

On February 12th, a Mrs. Jarvis wanted to know

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when the truck would arrive to pick up her goods. This we learned was a Presidio Order and was intended for National T/S.

Do not know of what value this information will be, as there is not too much detail.

Bob Adams

CC: File L. Hobman

Inter-Office Memorandum "F"

[Stamped]: Mar. 5-52-2:30 p.m.

To Lou Hobbman. From San Francisco. Subject National Transfer & Storage Co. Date 3 March 1952. San Diego, Calif.

Reference: Further information regarding subject Company, your Memo 12-27-51.

In the past few weeks, confusion between the names of National Van Lines and National Transfer and Storage has developed as follows:

Mr. Buckley inquiring about his goods coming from St. Paul, Minn. It was later learned his call was meant for National Transfer & Storage Co.

A lady called for Mr. Green. It was learned that Mr. Green was the dispatcher. We happen to know that Mr. Green works for National Tfr & Storage and does some of the dispatching. We therefore referred the lady to National Transfer.

A Mrs. Higbee, called wanting to know when drivers would be at her residence to load her furni-

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ture on January 16th. In checking our records we found that no such shipment was to load on the 16th or any other time. We called National T/S and they advised that this shipment was on their records.

Attached is a letter which is self-explantory:

Inter-Office Memorandum "G"

[Stamped]: Aug. 25-52-10:30 a.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National Transfer & Storage. Date 8/22/52.

Mrs. J. W. Roddy requested information as to the arrival of her goods from San Diego to Oakland. Goods were picked-up two weeks ago.

She extended the courtesy of calling this office to advise us that National T/S were handling her shipment.

Her phone number: Andover 1-3696.

Inter-Office Memorandum "H"

[Stamped]: Sept. 26-52-2:30 p.m.

To L. Hobmann—Chicago. From R. W. Adams. Subject N.V.L.-Nat'l. Trsfr. & Strg. Date 23 Sept. 52.

This morning our Oakland Office called and advised that a Mrs. J. I. McDaniels, of 396 11th Avenue, San Francisco, California (Ph: SKyline

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

2-1384) had called to cancell her order for moving to San Diego, California.

In checking we found that we did not have any such order. We called Mrs. McDaniels and found that she was actually trying to contact National Trsfr. & Strg. to have her order cancelled. She was confused between the two names, in fact she did not realize that there was a difference.

Bob Adams

Dist: cc: Eile (L. Hobmann)

Inter-Office Memorandum "I"

[Stamped]: Aug. 29-52-2:30 p.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 8/28/52.

On 8/27/52 we rec'd a call that should have gone to Mr. Green of Nat'l TS regarding that company purchasing the Yates V/L.

On 8/28/52 we rec'd a call from Capt. Wild whose shipment of household goods is being shipped by Nat'l. T/S. Order was given to them by Presidio of San Francisco. Capt. Wild wanted to know when he could expect the truck for the pick-up.

[In longhand]: 8/26—Call regarding delivery of lift van from overseas. National T/S has crating and uncrating contract.—B. Tracy.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Inter-Office Memorandum "J"

[Stamped]: Aug. 29-52-2:30 p.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 8/28/52.

Col. Lightbody was inquiring about when he might expect delivery on his shipment of furniture from Paso Robles, Calif. to 2361 Fruitvale Ave., Apt. 11, Oakland, Calif.

This shipment is being hauled by Nat'l T/S. They have an office in Paso Robles.

Inter-Office Memorandum "K"

[Stamped]: Sep. 3-52-2:30 p.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 9/2/52.

Received a call this AM from a Mr. F. C. Arnold of Iganico, Calif. wanting to know when we were going to take care of the settlement of his claim. His goods were delivered on 8/6/52.

After checking our files and further discussion with Mr. Arnold we learned that this shipment was handled by National T/S.

Inter-Office Memorandum "L"

[Stamped]: Sep. 16-52-2:30 p.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 9/15/52.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Rec'd a call this afternoon from Mrs. Wm. E. Martin of Alameda, Calif. Phone: Lakehurst 3-5831 regarding missing items, damage to her goods and the undesirable behaviour of the 3 men who delivered her goods. This shipment came from San Diego. Shipment was delivered 9/13/52.

She wanted to speak to Mr. Green. He works for National T/S.

Inter-Office Memorandum "M"

To L. Hobmann—Chicago. From R. W. Adams—San Francisco. Subject Trade Name Infringements. Date 17 January 1952.

B/L 58028—T. H. Hutto, Hayward, Calif. to Salisbury, Md.

The above order, indirectly, came from Stokely Foods. Mr. Hutto was leaving the employ of Stokely Foods and the Traffic Mgr. gave Mr. Allen's card to Mr. Hutto and told him to call us for his moving services.

Mr. Hutto lost the card and so when calling he consulted the Telephone Directory and of course got the National Transfer & Storage instead of this office. National T/S told him that Mr. Allen no longer worked for them and took his order, Mr. Hutto being under the impression that he was dealing with National Van Lines, Inc.

When the loading date came, Nat'l T/S van did not show up on time, so Mr. Hutto called the Traffic

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Mgr. of Stokely Foods and advised him. The Traffic Mgr. told him to call Mr. Allen, but of course Mr. Hutto said Mr. Allen did not work for us. The Traffic Mgr. said that he did and gave Mr. Hutto this office's phone number. Mr. Hutto called wanting to know where the van was to load his goods. This was the first we knew of such an order. Through conversation we came to realize what had taken place and explained same to Mr. Hutto. He asked if we could get a van over S.A.P. and we told him it would be there within two hours. He called and told Nat'l. Trsfr. to cancel their order. If Nat'l. Trsfr's. van had not been late we would not have gotten the order and Mr. Hutto would have thought he was still dealing with N.V.L.

Bob Adams

Dist: cc: Mr. F. L. McKee cc: File (58028)

Inter-Office Memorandum "N"

[Printer's Note]: Inter-Office Memorandum "N" is a duplicate of Inter-Office Memorandum "M".

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

"O"

[Stamped]: Mar. 5-52-2:30 p.m.

San Francisco, Calif., January 11, 1952

International Harvester Company,
Motor Truck Division
2855 Cypress St., Oakland, Calif.

Dear Sirs:

We are returning the attached statement, since we are of the opinion that this statement belongs to the National Transfer & Storage Co. of Oakland.

Our last Purchase order to you was No. 555 issued on 10-8-51 for a Transmission seal in the amount of 8.20 which was paid by our Chicago office, Check No. 7779 on 11/13/51.

Our records do not indicate we have placed any order for services with you during the month of December. However, if you will render an invoice giving us the drivers name, tractor and trailer number, etc., we will be able to check thoroughly.

Thanking you in advance we remain.

Yours very truly,

National Van Lines, Inc.
LaVern Erspan

Encl: Statement 1004.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)
"P"

[National Van Lines, Inc. Letterhead]

[Stamped]: Mar. 5-52-2:30 p.m. (Copy)

3 March 1952 San Francisco Office

Transport Clearings
150 California Street, San Francisco 11, Calif.

Gentlemen:

Enclosed please find invoice in the amount of $34.82 which is parked past due. We wish to advise that to our knowledge, we have no account with you. It is our opinion that your invoice is intended for National Transfer and Storage Company in Oakland. The names are very similar and often confused.

Very truly yours,

National Van Lines, Inc.
R. W. Adams

RWA:t cc L. Hobman File

Inter-Office Memorandum "Q"

[Stamped]: July 17-52-2:30 p.m.

To L. Hobmann—Chgo. From R. W. Adams—S. F.
Subject Nat'l. Trsfr. & Strg. Date 16 July 1952.

Attached are photostats of letters received by Transportation Officer at Presidio of San Francisco from Shipper confusing Nat'l. Trsfr. & Strg. with National Van Lines, Inc., also photostat of letter from Transportation Officer.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

The shipment in reference was not handled by National Lines, Inc., but by National Transfer & Storage of Oakland as agent for Howard Van Lines.

Hope this will be of use to you.

Bob Adams

Dist: cc: File (L. Hobmann) cc: F. L. McKee—Los Angeles

"R"

Headquarters, Presidio of San Francisco, Calif.
Office of the Post Transportation Officer
AMNPR—TO 552.02 11 July 1952

National Van Lines
540 Turk Street, San Francisco, Calif.

Gentlemen:

Inclosed is copy of letter from Mrs. Ellen Shimasaki regarding personal effects which were not delivered to her on move of household goods from San Francisco, Calif. to Fort Bragg, N. C.

Request that you investigate this and advise Mrs. Shimasaki at an early date with copy of your reply to this office.

Sincerely yours,

/s/ Roger H. Brown
For W. P. Schopper, Lt. Col., TC, Post Transportation Officer.

1 Incl. Cy ltr

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

"S"

(Copy) June 18, 1952
1746 Geary St., San Francisco, Calif.

Post Transportation Office
Building 86, Presidio, San Francisco, California
Attention: R. H. Brown

Dear Mr. Brown:

When my husband, 2nd Lt. Fred F. Shimasaki 02211903 MSC was ordered to Fort Bragg, North Carolina, we had our household goods moved by the National Van Lines of Oakland through an army contract.

The movers came to do the packing on January 4, 1952. When the movers had finished their job, we noted that some hats (about 8 or 10) were still not packed. Since the men had run out of boxes, they loaded these on the truck and promised to pack them in a box after they had reached the warehouse. Hence these hats were not listed on their inventory sheet.

We have written to the company, but they claim that nothing can be done about the claim since it was not listed on the inventory sheet. We paid $6.00 to have our goods insured for $1000.00 and I am sure the drivers of the truck who did the packing for us could verify my story.

My husband being in Korea, he is unable to do anything about the matter and I would appreciate

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)
any help you could give me. I may be reached at my work from 8-5 Monday thru Friday at We 1-8000 Extension 72.

Sincerely,

/s/ Ellen Shimasaki

A True Copy: Signed Roger H. Brown, CTA.

You may cross-examine.

Cross Examination

Mr. Whelan: Q. Mr. Adams, how old are you?

A. 29.

Q. And I believe you have testified that you are now the claim adjuster for Bekins Van & Storage Company?

A. Will you please repeat that?

Q. I say you are now the claims adjuster for the Bekins Van & Storage Company?

A. Not the claims adjuster; I am a claims adjuster, yes.

Q. And you have been with them approximately nine months? A. Yes; September 3, 1953.

Q. And how long were you with this Peters & Sons?

A. Peters & Sons. Oh, I'd say two months.

Q. And what was your capacity with them?

A. Actually, I worked as part-time sales to fill in while I was looking for work.

Q. And are you a San Francisco resident?

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

A. Yes, I am.

Q. How long have you lived here?

A. I have lived here since March of 1949.

Q. And you first went to work for the National Van Lines in what year? A. 1948.

Q. And, as I understand your testimony, you were first a billing clerk for them?

A. That is correct.

Q. In Los Angeles? A. That's right.

Q. And how long did you have that job?

A. I'd say six months.

Q. And your next job with them was dispatching? A. That's right.

Q. Here in San Francisco? A. Yes.

Q. How long did you have that job?

A. I'd say for a year.

Q. And then you became office manager, is that right? A. Yes.

Q. How long were you office manager?

A. Well, I think in an office of that size——

Q. No, just answer my question. I want to know how long you were office manager, approximately.

(No response.)

Q. You are hesitating, Mr. Adams?

A. I am merely trying to get it straight in my mind. As a matter of fact, the office manager and dispatch would have been together.

Q. I see. A. At the same time.

Q. So that was for approximately a year?

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

A. Yes, from '49—March, '49, to approximately February, 1950.

Q. And, then, thereafter was when you became district manager for the San Francisco bay area, is that right? A. That's right.

Q. And how long were you district manager?

A. Up until May of 1953.

Q. Now, I believe you have testified that during the time you were in the San Francisco office, from March of '49 until the time you left in March of '53, the number of your employees varied between five and six, is that right? A. That's right.

Q. Did you have much of a turnover in personnel? A. No.

Q. In other words, the people who were there in '49 were the same when you left in '53?

A. No, the five and six were in late '49 and perhaps the first part of '50, and from '50 on I don't think the personnel was over more than four within the office, itself.

Q. I see. Starting about January 1, 1952, will you tell me the names of the employees of National Van Lines that were under you in this district office? A. In January, 1952?

Q. That's right.

A. There was a Burt Tooey.

Q. What was his job?

A. He was dispatching and was in charge of the office.

Q. Yes. A. That is——

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Q. He was the man that had replaced you?

A. I beg your pardon?

Q. He was the man that took your job?

A. No, I left——

Q. I mean as you moved up?

A. That's right.

Q. All right. The names of the others, if you recall?

A. In January, the first part of '52, I believe it was just myself, Mr. Tooey, and a girl that I can't remember her last name. Her first name was Rae. I can't remember the last name.

Q. At the time that you left in '53, what were the names of the employees who were at that time under you? A. Mr. Allen.

Q. What was his job?

A. He was a salesman. And Miss Erspan and Mr. Knickerbocker, and that was all.

Q. In other words, there were only three employees then under you?

A. Counting myself——

Q. Four, counting yourself?

A. Three under me, yes.

Q. Then, there's a variance with your testimony on direct examination that the number of employees was between five and six, or would you explain that?

A. I was asked the question: What were the number of employees during the time you were in the San Francisco office, and at the time I came here in '49, there were two when I first started, and

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

then we increased our force up to either five or six. We had a man working on claims, who—that man also worked on sales—and we had another salesman. We had a Mr. Richardson.

Q. When was that? A. This was in '49.

Q. '49?

A. What I am trying to do is tell you when the five and six were there.

Q. I see. In other words, when you said it varied between five and six, what you meant was it varied between two and five from the time you came into the San Francisco office, a minimum of two and a maximum of probably six, is that right?

A. I'd say a minimum of three.

Q. All right.

A. And a maximum of six, yes.

Q. Now, where was the National Van Lines located in San Francisco in February of 1950?

A. In February of 1950 it was located at 607 Market Street.

Q. And thereafter did the address of National Van Lines change at any time?

A. Yes, we moved to 540 Turk Street.

Q. And is that the present address?

A. No, the offices were closed in May of '53, and there is now in use an agency in place of the National office which represents National Van Lines here in San Francisco, and what their address is I am not sure.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Q. National Van Lines no longer has an office here in San Francisco?

A. It no longer has a regional office, no.

Q. Let me ask you this question: Does it have an office here, without any reference to agents?

A. No.

Q. Now, what was the telephone number of the National Van Lines from the time you joined the San Francisco office in '49 up until the time you left them in February or March of 1953?

A. That I cannot answer.

Q. All right. Was that telephone number ever changed? A. From March——

Q. No, from 1949 up to the time you left in 1953, a four-year period? A. Yes, it did.

Q. How many times did the phone number change, from your recollection? A. Twice.

Q. Twice. Did the National Transfer & Storage Company, the defendant in this action, have an office in San Francisco between the period of 1949 and the period that you left National Van Lines, Inc., in February of 1953?

A. I left them in May.

Q. Pardon me. May. I am sorry if I am misstating your——

A. No, they had their offices in Oakland.

Q. Did they have the same telephone number as the National Van Lines office here in San Francisco?

A. Did they have the same telephone number?

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Q. That's right. A. I don't think—no.

Q. Do you know where the National Transfer & Storage Company's office was located in Oakland after February of 1950?

A. It was located, I believe, in the section which is called Emeryville. I don't know the exact street. Maybe San Pablo.

Q. Do you know their address?

A. No, I do not. I did at that time. Is that what you mean?

Q. I want to know if you know now.

A. No, I don't recall it now.

Q. When, Mr. Adams, would you say the confusion here started, from your recollection, with regard to National Van Lines, Inc., and National Transfer & Storage Company concerning calls that were either for one or the other company, approximately?

A. I think in—it was always there; however, when they were an agent, the principal wouldn't push the agent on things such as that and cause friction.

Q. Well, let me ask——

A. But we didn't notice the confusion, actually, in the volume that it was in, until after we no longer had an agency working agreement with National Transfer & Storage.

Q. When was that?

A. That I believe was in February of 1950.

Q. And at that time you were still the office

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

manager, or had you become the district manager?

A. It was just changing.

Q. Just changing. At National Van Lines after you became district manager up until the time you left National Van Lines in May of 1953, did you have a girl or an operator to handle telephone calls?

A. Yes, we did.

Q. And was a record kept of the number of incoming phone calls each day? A. No.

Q. In other words, if I understand your testimony, unlike other offices which keep records of incoming calls, no record was kept?

Mr. Groen: I object to a question of assumption like that, that other offices all keep incoming calls.

The Witness: Well, I was about to say no——

Mr. Whelan: Let me strike that. You may be right, Mr. Groen.

The Witness: No, because Bekins doesn't do that.

Mr. Whelan: Off the record.

(Unreported discussion.)

Mr. Whelan: Back on the record.

Q. Mr. Adams, as I understand your testimony, no record was kept, from your knowledge, of incoming calls after you became district manager until the time you left, and probably no record of incoming calls was kept prior to the time that you became district manager back to at least 1949, is that correct?

A. That is correct. It would require the full time of one person just to record those calls.

Q. I see. A. Aside from answering.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Q. Now, that's the next question. After you became district manager in 1950, about February of '50, can you tell me from your recollection what was the number of incoming calls per day?

A. I would say it varied between 200 and 300, depending on the——

Q. How many calls would you, yourself, personally take after that period of time? In other words, I am referring now to February of '50 up until the time that you left in May of '53.

(No response.)

Q. Just approximately.

A. I'd say 125; so many that at times I was busy——

Q. In other words, you had a busy office; you were handling an average—is this a fair statement—of between 100 and maybe 150 phone calls a day?

A. Yes.

Q. Incoming. Does that include in your number the number of calls that you might put out in the course of business for National Van Lines, or would that be another figure?

A. I would say that would be another figure.

Q. What would that figure be, approximately, for this period, now, of between February of 1950 and May of 1953 when you left National Van Lines?

A. Now, there again you are asking me something which you are giving a definite period, and

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

there are times in that period which were very peak points.

Q. All right.

A. And I am giving you those peak points, not the points when business would lull, which is——

Q. I understand that.

A. ——traditional yearly in transportation.

Q. That's what I wanted to clear up, because I was going to come to that. In other words, then, the figure you have given us was a peak period?

A. It was.

Q. All right. Now, tell me this, Mr. Adams: From your experience as district manager between February of '50 and May of 1953, can you tell us just about what your peak periods covered during a year? Is there any way to break that down?

A. Well, they vary. I am sure that the—there are records in Chicago——

Q. Well, from your knowledge, now. This is just from your recollection, because you mentioned here that the figure of 100 to 150 phone calls incoming that you personally received was a peak figure. That is a figure for calls at a time when you were really rushed, but didn't represent times when you wouldn't be.

A. That's right. There'd be—in the summer months we are busy.

Q. That would be, then, somewhere between the 1st of June and the last part of September; would that be a fair statement?

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

A. Yes, that's right.

Q. Now, when you became district manager of National Van Lines, Inc., in February of 1950, approximately, who was the manager or the head of the National Transfer & Storage Company in Oakland at that time? A. Mr. Renner.

Q. Renner. Would you spell that?

A. R-e-n-n-e-r.

Q. And do you know how long he continued as manager, from your own recollection?

A. I'd say about two, maybe three, months. I couldn't be sure.

Q. And who thereafter became manager over there? A. Mr. Green.

Q. Mr. Green? A. Mr. Green.

Q. And how long did Mr. Green continue as manager of the National Transfer & Storage Company, from your recollection?

A. To my knowledge, right up till the time I left National Van Lines.

Q. In other words, he was there up until at least May of 1953, and possibly continued?

A. Yes, he still may be there.

Q. Prior to testifying here today, Mr. Adams, when was the last time that you saw these interoffice memoranda which have been offered here with the deposition?

A. Well, now, that would be—they were in our files—copies of them were in our files when the office was closed in 1953, in May.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Q. I see. So that the last time, then, that you saw the copy of which this is a photostat (indicating), or these are photostats, was in May of 1953?

A. Yes.

Q. Approximately thirteen months ago?

A. That's right.

Q. Have you discussed this case at all with any one since May of 1953 prior to testifying here this morning? A. No.

Q. After the action was commenced in this case in November of 1952, in between that period and May of 1953, was there any discussion of this case with any individual? A. No.

Q. Were these office memoranda that have been introduced by Mr. Groen along with the deposition ever discussed between November of 1952 and May of 1953? A. No.

Q. Was there any discussion of these interoffice memoranda with any one prior to November of 1952? By "these office memoranda," I am referring to the exhibits here that are marked, I believe, "A" to "S", and I am also including the several letters that I believe you were shown earlier.

A. Would you ask that again, please?

Mr. Whelan: Would you repeat the question, Mr. Reporter?

(Question read by reporter.)

Mr. Whelan: Q. And testified to?

A. Beg pardon?

Q. I am adding to that, "and testified to."

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

A. That's a difficult question to answer, in that they would have been discussed at the time that these events took place which are on those memoranda, and once they were written and put into the file, I haven't seen them since.

Q. In other words, that's what I wanted to find out. Was that ever discussed—these interoffice memoranda—with Mr. Groen at all? A. No.

Q. Prior to November of '52? A. No.

Q. And aside from the discussions that you mentioned in your direct examination by Mr. Groen, that was the only discussion that was had on these memoranda with the particular individuals that might be involved? A. That's right.

Q. So that your testimony here today is based upon your recollection of incidents that occurred from a period of approximately January of 1952 until the time you left in May of 1953, is that correct? A. That is correct.

Q. And your recollection at no time prior to testifying here today has been refreshed by the seeing of these interoffice memoranda or reading any part of them prior to testifying? A. No.

Mr. Groen: I think, if I may interject here—do you understand these questions as prior to testifying, or are you thinking of today? We did discuss them this morning. I want the record to show that.

Did you understand that question?

The Witness: No, I didn't. I have seen them today and prior to——

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Mr. Whelan: That's what I am going to come down to.

Mr. Groen: I didn't want——

Mr. Whelan: Q. I gather that you have seen——

Mr. Groen: We discussed them this morning.

Mr. Whelan: Q. (Continuing:) ——these interoffice memoranda this morning before you testified?

A. Yes.

Q. I was referring to before today?

Mr. Groen: All right. I just wanted to make that clear.

The Witness: You meant before today?

Mr. Whelan: Q. That's right. A. No.

Q. In other words, the first time that you saw them between the time that they were put into your office files was this morning?

A. That's right.

Q. And at that time you discussed them with Mr. Groen before testifying here today?

A. That's right, yes.

Q. Now, Mr. Adams, with reference to the interoffice memoranda, I would like you to be a little patient with me. I am referring to the first one here that is marked with an "A", and it has on it the date July 1, 1952. Will you explain to me what this stamp, "July 3, '52—2:30 p.m.," means?

A. Yes, that is the date that the original would have been received in the Chicago office.

Q. I see. And in this memorandum it refers to a call by a Mr. R. C. Allen of Business Machines.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Did you personally talk to Mr. Allen on this particular matter concerning the cartons that had been sold sometime before, and that he wanted to know if they could secure some more?

A. Yes, I think I did.

Q. Do you recall about what time of the day that call came in?

A. I think it was in the morning.

Q. And you mentioned in your direct examination that you made notes, and then later turned them over to the secretary for typing up, which were made into these forms of interoffice memoranda? A. That's right.

Q. What did you do with your notes?

A. I imagine after she had typed them up, she'd —they were pieces of regular scratch pads, and they'd be discarded.

Q. They'd be discarded. Now, with regard to "B," which is a triplicate statement from whom?

A. Apparently we didn't record that.

Q. So that you don't know from which company this triplicate statement for 59 fibre drums at such and such an amount, total $73.75, was from?

A. No, I don't.

Q. Now, with regard to "C" memorandum, which is a call from Mrs. Reiss, it's under the date of July 16, 1952. Would these office memoranda be typed up the same day as you received a call, or would it be routine to possibly type it up a day or so later?

A. Well, in some cases they might have been

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

typed up a day later, and in many cases they were typed the same day.

Q. The same day. Would this "L. Erspan" always be the typist if her name is on the top?

A. Yes.

Q. "SF office—L. Erspan"?

A. That's right.

Q. Did you, personally, talk to Mrs. Reiss on this call concerning the crating and shipment of her goods for overseas?

A. Yes, I believe so. I think Mrs. Reiss was from across the bay.

Q. And you then checked with the National Transfer & Storage Company in order to find out if they had the contract for that?

A. No, I know that they do—did have the contract.

Q. You didn't check with them to find out whether they did or did not?

A. I didn't think it was necessary, because all of the movers in the area had placed bids for the packing and crating contract, and it had been published by the government who was awarded the contract.

Q. When had this contract been awarded, do you know, to the National Transfer & Storage Company?

A. For that year. I would say the definite period I do not know. The definite date I do not know, either.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Q. In other words, it was at least for the year 1952?

A. Yes. In other words, since then I have—at that time I am sure I knew. There is knowledge, working knowledge, that you have in particular jobs that you have, and when you leave and go onto another job, that working knowledge necessarily is replaced with other working knowledge, is gone. You don't remember, and I don't recall——

Q. You would concede, Mr. Adams, that a working knowledge might not necessarily be correct, is that right? A. No, I wouldn't say so.

Q. In other words, what you are saying is that your working knowledge in all respects was true and correct?

A. Are you referring to the contract?

Q. No, I am talking generally now, because you were talking generally.

A. Well, I think the answer there has to be that a working knowledge cannot always be correct. I mean otherwise no one is ever incorrect.

Q. Now, with regard to——

A. Or not incorrect.

Q. ——this government contract which was for handling overseas shipments of household goods, did National Van Lines ever have that contract during the time that you were district manager?

A. No.

Q. Did any other company other than National

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Transfer & Storage Company have that contract? If you don't know, say so.

A. During what period?

Q. From the period that you became district manager until the time you left in May of 1953.

A. Yes, I believe there were others.

Q. There were others. Could you give me the names?

A. It is a contract that's awarded yearly, and sometimes they change and make it every six months.

Q. Could you give me the names of some of those other companies that had this overseas contract with the United States Government?

A. Yes. I don't know what the name of the company would be in this case that actually had the contract, because the company has two or possibly three different names. One is Dick's Van & Storage, and Federal Van & Storage. Which of those had the contract I don't know.

Q. Did Bekins Van & Storage ever have it during that period of time you were district manager?

A. Did Bekins?

Q. That's right, from your knowledge.

A. From my knowledge, they did not have the particular contract that we are referring to, no.

Q. During the time you were district manager, from February of 1950 to May of 1953, did you ever receive calls from people who had made a mistake and thought that the National Van Lines had

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the shipment of their goods, and it turned out that National Van Lines did not have it?

A. Did I ever receive a call from people who made a mistake——

Q. That's right.

A. ——in calling for——

Q. In other words, in calling National Van Lines to find out if they had the shipment of goods, and it turned out National Van Lines did not, other than your testimony here with regard to National Transfer & Storage?

A. In other words, did we ever have people call us for shipments we did not have?

Q. Correct.

A. Other than for this confusion business, no.

Q. No office memorandum was ever made on any other company?

A. Not to my knowledge, no.

Q. During the time you were there?

A. Not to my knowledge.

Q. Do you know if National Transfer & Storage Company had an ad in the San Francisco telephone book from February of 1950 until May of 1953?

A. I am not sure about the first part of '50, but they did, during the period that you are referring to, run an ad in the San Francisco telephone book.

Q. Do you know whether that was one of these large ads that takes up part of a page?

A. I think it was a quarter-page ad.

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Q. A quarter-page ad. It set forth their place of business, from your recollection, and their telephone number? A. I believe it did.

Q. Was it on the same page, as you recall, as National Van Lines, Inc.'s ad?

A. I don't believe it was on the exact same page. It may have been on a facing page.

Q. You remember on memorandum "D", which is the call from the Bekins Transportation Company in Oakland concerning a claim of P. G. Slattery, who it was that you talked to in the Bekins' office in Oakland? A. No, I do not.

Q. Do you remember the approximate date of the call? The memorandum, to refresh your memory, is dated June 28, '52, and I was wondering if that call came on that date or possibly a day or so earlier.

A. I believe that was possibly a day or so earlier. In fact, I think that particular one was held and typed up later, yes.

Q. Since that memorandum was made, on or about June 28, 1952, until this morning when you discussed it with Mr. Groen, it was the first time that you had viewed that memorandum, correct?

A. That's correct.

Q. And that's a period of approximately two years, is that correct? A. Correct.

Q. On memorandum "E", which is the Camp Stoneman call, in examining this memorandum, I see no date on it, but I notice that it's stamped

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"March 5, 52—2:30 p.m.", which, as I recall your previous testimony on another memorandum, would be the date it was received in your Chicago office, is that correct? A. That is correct.

Q. And it would take approximately two days to transmit it to Chicago?

A. One or two days.

Q. One or two days. So this memorandum, then, was probably typed up somewhere about the 1st of March of 1952?

A. I believe it's safe to say so, yes.

Q. Do you recall who you discussed the shipment of goods of Sergeant Ben Gersatoness with at Camp Stoneman? A. No, I wouldn't.

Q. And——

A. In discussions with people in offices such as that, you——

Q. You just made the notation on your scrap note? A. That's right.

Q. The notes you were making that it was from Camp Stoneman? A. That's right.

Q. And until this morning when you discussed it with Mr. Groen, it was the first time that you have seen this since it was transmitted to Chicago in March of 1952?

A. Well, now, on all of these, I can't say that this is the first time since the date of those memoranda, because, as I said, in May of 1953 we still had them in my office, and I did make it a practice to check our files. I imagine up to that date I prob-

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ably had these memos out and reviewed them, yes, in May of 1953.

Q. Do you know that you did review this particular memorandum in May of 1953 before leaving National Van Lines?

A. No, I don't know that I did that particular one in May; no.

Q. I see. Would you recall prior to May, 1953, and after March 5th of 1952 whether or not you did look at this particular memorandum again concerning the Camp Stoneman——

A. Would I recall the date?

Q. No, whether you did look.

A. I recall that I have looked at the file containing all of those memoranda, yes.

Q. But whether you looked at this particular one, Mr. Adams—do you know that or not—between March 5th and May of 1953?

A. I think I did, yes.

Q. You recall when?

A. I think I asked you just before if you meant the particular date that I did, and I said I didn't know the particular date.

Q. Well, do you recall the approximate month?

A. Oh, I would say January, February, 1953.

Q. Why? A. Pardon?

Q. Why did you look at this particular memorandum at that particular time in January or February of 1953?

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(Deposition of Robert W. Adams.)

A. I think you are getting down—you are——

Q. Just answer my questions.

A. Why? In order to explain why, there was no direct reference to this particular memorandum, no, in looking, but I happened to be in the file, and thumbing through, reviewing these, and I do recall having seen that one in the file at that time.

Q. With regard to the memorandum which is marked "F", which is dated March 3, 1952, it has reference to a lady calling for Mr. Green. Mr. Green, as I understand your testimony, was the dispatcher for the National Transfer & Storage Company?

A. That's right, he did a certain amount of dispatching for them. He might have been their office manager at that particular time. What his exact official title on the payrolls was, I do not know, but I do know that many times I talked with him in connection with dispatch of shipments and that sort of thing.

Q. Yes.

A. I would be under the impression that he would be the one that she was referring to, since there is only one Mr. Green that I know of in the transportation business in the bay area at that particular time, and the fact that she mentioned "dispatcher," I would be thoroughly convinced that she meant Mr. Green of National Transfer & Storage.

Q. This memorandum "F" refers to two calls. Were there two calls here, one from an unknown

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lady and the other from a Mrs. Higbee, or was it both the same?

A. There were two calls.

Q. Two calls. And you didn't inquire of the lady who called for Mr. Green what she wanted?

A. No. If a person calls in, ofttimes not for a particular person, and you explain that person isn't there, you wouldn't inquire further.

Q. That's what I mean. You don't know on that particular call whether it was personal or social or what? A. No.

Q. The only one you know that was of a business type was this second call from Mrs. Higbee, correct?

A. I don't understand your question. The only one——

Q. I mean there's only two calls here.

A. Oh.

Q. I am referring now to this memorandum (indicating). A. Oh.

Q. Now, did you talk to Mrs. Higbee on this particular occasion?

A. Would you refresh my memory?

Q. The date of it is March the 3rd, 1952, and I am referring to this last paragraph.

A. (Examining document.) Yes, I did.

Q. Do you remember, Mr. Adams, what time of the day—by that I am referring to the morning or the afternoon—that this particular call came in?

A. I believe it was shortly before lunch.

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Q. Then, there's a notation on this, "We called National T/S", which refers to National Transfer & Storage Company, is that correct?

A. That's correct.

Q. Who called? A. I called.

Q. And who did you speak to?

A. I spoke with Mr. Green. In fact, I spoke with some girl in the office who answered the telephone and got Mr. Green for me.

Q. This memorandum, as distinguished from some of the other interoffice memoranda that have been introduced here along with your deposition at the close of the direct examination, does not have your name at the bottom of it, is that correct?

A. That's correct.

Q. Now, what I'd like to find out, Mr. Adams, is this: When the word "we" is used, what does that mean? I mean I am just trying to find out.

A. I think it means what any persons in any company mean when they say "we" in reference to this: We as a group, we as a company, we who cooperate or who are together in an office.

Q. In other words, it was not your practice in the inter-office memoranda to make the mention that "I" phoned? A. No, no.

Q. Or that "X" phoned?

A. No. You, perhaps—if I were writing directly to an individual, then I would use the word "I". In writing to a file, which in effect was our impression in doing this, we were putting it—keeping a

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file, creating a file, and those who were reading it would use that tense, or the word "we".

Q. These interoffice memoranda was being forwarded to your Chicago office; is that correct?

A. That's correct.

Q. To an individual in that office?

A. Who was keeping the file, that's correct.

Q. And in these interoffice memoranda like this one of March the 3rd, '52, which I have just been discussing, there would be no way for the man receiving it in Chicago—on this one it mentions Lou Hobbman, I believe—to know who actually did this work?

A. That's correct, apparently, in this particular case.

Q. Now, on memorandum "Q", which is also addressed to Mr. Hobmann, in Chicago, and refers to the request of Mrs. J. W. Roddy with regard to her goods arriving from San Diego to Oakland, I'd like to ask you this question: What was Mr. Hobmann's capacity with the National Van Lines?

A. At that particular time?

Q. That's right; this is dated August 22, 1952.

A. 1952. I believe he was sales manager. I am not sure.

Q. Sales manager. Is your Chicago office the head office for the National Van Lines?

A. That is right.

Q. Do they have a district manager there, too, like you have the same capacity here?

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A. Well, that—never having been to the Chicago office, I don't think they have——

Mr. Groen: Off the record.

(Unreported discussion.)

Mr. Whelan: I think that I should have the right to cross-examine at length, and I was under the impression when I came up here for this deposition this afternoon that we, frankly, wouldn't have the amount of exhibits that have been put in, because to intelligently cross-examine on them takes a little time.

Mr. Groen: But they are all of the same character.

Mr. Whelan: That is what—I was going to save time on this next point.

Mr. Groen: They are all directed at the same point, so if there are two or two hundred, it's all the same.

Mr. Whelan: My point is I have the right to test this witness' recollection, and, for example, this man Mr. Hobmann is named on "A" to "G"—on every memorandum, and I think I should know what his rating is.

Mr. Groen: All right, he's manager of the Chicago office, I believe. Mr. McKee will testify to that eventually.

Mr. Whelan: I want to know if the witness knew that, see.

The Witness: I think if you will go back, you

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will find—at this particular date, I don't think he was manager of the Chicago office.

Mr. McKee: No.

Mr. Whelan: Q. That's what I wanted to find out.

A. I think you will find my memory is quite good.

Q. And I ask you this, Mr. Adams: Why was the interoffice memoranda sent to Mr. Hobmann rather than to the president of National Van Lines?

A. Well, I think a president of any company as large as National Van Lines cannot receive memos such as this from all offices; he has to delegate authority to a particular individual or entrust to a particular individual to handle a certain matter, and I assume that Mr. McKee, who is president of National Van Lines, knowing of this situation, delegated authority or asked Mr. Hobmann to keep a record of this and have it available for Mr. McKee if he should ever want to see it.

Q. Do you know whether or not he did, though, delegate Mr. Hobmann to take care of this particular confusion that you have been testifying about here?

A. Yes, he did. One time on a visit in San Francisco, he directed us to send copies of our memos to Mr. Hobmann in Chicago. I think, in fact, you will find one of those memos we forwarded Mr. Hobmann we were so told by Mr. McKee.

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Q. One of these memoranda that have been introduced here this afternoon?

A. Yes. I think it's one of the ones on the bottom.

Q. Can you tell me this, Mr. Adams: Some of these memoranda indicate your name as typed on the bottom of it. On the original that would be sent to Chicago to Mr. Hobmann, would you sign those?

A. I don't think so, no.

Q. In other words, your name would just be typed on?

A. That's right. I wasn't in the habit on interoffice memoranda of signing them.

Q. Why on some of the interoffice memoranda which are identified here as "A" to "S" is your name on some and no name on others?

A. I think there is only one in that group that has no name on it, which was perhaps an interruption right at the end of the memorandum, telephone call, or some such interruption, which on returning I thought the memo was complete and pulled it and put it in the mail, and therefore it was not.

Q. On these first ones I have been questioning you about, Mr. Adams, from "A" to "G", can you tell how many of those have your signature and which haven't?

Mr. Groen: He said none had his signature that he recalls.

The Witness: No, no signature.

Mr. Whelan: No, the name.

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Mr. Groen: Are you talking about the name on the bottom or the name on the top?

Mr. Whelan: Q. I am sorry. You misunderstand——

A. This has "San Francisco" but no name, and no name down here (indicating). That is the name I am referring to.

Q. That is "G"?

A. No, that's "F". I beg your pardon.

Q. All right.

A. This one has a name on the bottom.

Q. You are referring to "E"?

A. "E". "D" has a name at the top. "C" has a name at the top. "B", "A" and "G" all have names at the top.

Q. That name at the top is the typist, right?

A. That is who it is from.

Q. Right.

A. See, this information is being conveyed to a file, and this memorandum is from whoever would put their name up there to Mr. Hobmann in Chicago, and this information, which is going into a file, I wouldn't be in the habit of putting a signature on every one of them.

Q. Yes. Or having your named typed on it?

A. No, or having my name typed; no. I think you will find on some of those there are three particular cases on a memorandum, and the dates are given, which is what I was referring to in saying that I would make notes on the scratch pad, and

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that they would probably the following day or day after be typed up, and Mrs. Erspan was the one who would type them for me. Don't you find one there that has the date August, and it's eight something, and another one is eight something? They are all on the same memorandum.

Q. These first exhibits that I have questioned you about, "A" through "G", of course, appeared —well, let me put it this way: From "A" to "E" have covered a period of March through July, is that correct?

A. (Examining documents.) March to July?

Q. That's right?

A. Yes, that's correct.

Q. And as I believe you have already testified, your busiest season was between June 1st and roughly the end of September, is that correct?

A. I guess I did, that's correct.

Q. And on this memorandum "H", and I am going to try and speed this up as fast as I can, this refers to a call from a Mrs. McDaniels, and she was confused, according to the memorandum, between the two names. In fact, quoting, she did not realize that there was a difference. This memorandum is one that's from you to the Chicago office, and has your name typed at the bottom. Did you talk to Mrs. McDaniels? A. Yes, I did.

Q. Do you recall what time of the day the call came in? A. No, I don't.

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Q. Did she actually tell you over the phone that she was confused with these two names?

A. I wouldn't have put it on that memorandum if she hadn't. Yes, she did.

Q. She told you that she was confused?

A. After——

Q. After she talked to you?

A. Wait a minute. You say "confused"?

Q. That's right.

A. She said she didn't realize there was a difference, there were two different companies.

Q. I see.

A. Not confused; she didn't know there were two, so she couldn't have been confused.

Q. Then, the words "She was confused between the two names," is your language and not her language, is that correct?

A. That is correct. She would be confused, since she didn't know there were two companies, and she was calling us, thinking she was doing business with National Transfer. She must have been confused.

Q. I notice her address is 396, 11th Avenue, San Francisco. Do you have an Oakland office, also?

A. Did we have a National Oakland office? No. We had—I beg your pardon. We had, in effect, an office, yes. We had an answering service over there which was advertised as an office, and that office relayed calls to us here in San Francisco.

Q. So when the memorandum refers to "our

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Oakland Office," it really is referring to your answering service in Oakland?

A. That's right.

Q. At this time during 1952 and 1953, did you have an answering service in San Mateo County and Marin County and Alameda County?

A. No.

Q. So the only place that you had an answering service was in Contra Costa County, right?

A. Correct.

Mr. Whelan: Off the record for a minute.

(Unreported discussion.)

The Witness: You said "Contra Costa"?

Mr. Whelan: That's why I corrected myself here. Then, you had an answering service in Alameda? A. That's correct.

Q. That's the only place you had an answering service, and your only other place of business was here in San Francisco for this area?

A. That's right.

Q. What did this area cover, Mr. Adams? In other words, as district manager what area did you supervise? A. From Monterey on.

Q. From Monterey to the California border?

A. Well, we didn't have—I would say yes, but we didn't have a great deal of business up on the border. I mean there is not the populace.

Q. I notice in some of these memoranda, like "I" and "J", there were phone calls from army personnel. I am referring to a phone call from

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Captain Wild and, "J", to Colonel Lightbody. Was this concerning the overseas contract that National Storage—National Van & Storage had?

A. You mean National Transfer & Storage?

Q. National Transfer & Storage Company had?

A. Would you repeat that? I am not——

Q. Well, there are two memoranda here, "I" and "J", that refer to calls received from a Captain Wild and Colonel Lightbody with regard to their shipments of furniture. One applies to furniture being picked up at the Presidio, and the other refers to furniture to be shipped from Paso Robles to Oakland. What kind of a contract was that under; do you know?

A. That wouldn't be under any blanket contract. Those—if they were from the Government—in some cases officers pay for their own. I don't know definitely whether those were contracted for by the Government, but if they were, they would be one contract for that one move.

Q. In other words, each one is an individual one?

A. That is correct—well, of course, that depends on the type of move, but in that case they would.

Q. Did you personally talk to Captain Wild on August 28, 1952?

A. May I see that memorandum?

Q. Yes.

A. (Examining document.) Yes, I think I did.

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Q. Do you remember what time the call came in? A. I'd say about 9:30.

Q. Did you receive a call from Colonel Lightbody on August 28, '52?

A. May I see that?

Q. Yes.

A. (Examining document.) Pardon me. I do have to take time to think this through—I mean I have been asked before, and they have been switched around here, Lightbody, Reiss, and all these names—in order to get them properly in my mind.

Q. That's why, Mr. Adams, I was taking these memoranda in the same order that you have been asked before by Mr. Groen; so that the order would be the same for the purpose of this deposition.

A. I think once you get off the track—I think I did, yes.

Q. With regard to memorandum "L", concerning a call from Mrs. William E. Martin of Alameda, did you personally take that call from her on 9/15/52? A. From Mrs.——

Q. Martin. A. Martin.

Q. Of Alameda. I will show you the memorandum. A. (Examining document.) Yes.

Q. Do you recall what time of the day that phone call came in?

A. I believe it was in the afternoon.

Q. Is it possible, Mr. Adams, on some of these interoffice memoranda, everybody discussed here both during direct and cross-examination, that some

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of these calls were taken by some one other than you and reported to you?

A. I think earlier in the testimony I said that there was—I think I referred to one which I did not take, yes.

Q. But——

A. However, the office was so small and so close that I was concerned with all of them and knew exactly what was happening and what the circumstances were in all cases. In other words, Mrs.—Miss Erspan discussed anything she might have had on her own with me before she would take any action.

Q. Well, was there more than one instance in these office memoranda which was discussed by Miss Erspan with you where she had received a phone call from any of these people?

A. There may be, yes.

Q. Now, on this memorandum "M", which concerns this Stokely Foods order, as I understand your testimony, you talked directly to Mr. Hutto?

A. That is correct.

Q. And he gave you some of the information that is contained on this memorandum?

A. I think he gave all of the information to me.

Q. You mentioned here that Mr. Hutto lost the card that the traffic manager of Stokely had given him of Mr. Allen's, is that right?

A. That's right.

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Q. Did Mr. Allen ever work for National Van Lines?

A. Mr. Allen was working for National Van Lines at that time, yes.

Q. You say that he consulted the telephone directory, and, of course, got the National Transfer & Storage Company instead of this office?

A. Well, he lived, I believe, in Hayward, and he would have an Oakland directory, and got the National Transfer & Storage telephone number. There again the quick glance at a page, and this is the National that he is after, and he called that number and got National Transfer.

Q. Well, you have no trouble, do you, Mr. Adams, in distinguishing between National Van Lines and National Transfer & Storage Company if you were calling them up for, say, a shipment of your goods?

A. Well, having been in the business for eight years, I think I know pretty well, but I am not what I would say would be the average customer who is shopping for a moving company.

Q. I asked you, though, would you have any trouble now?

A. Would I now?

Q. Yes.

A. I think if I were just casually glancing at something and not staring at them, I might have trouble, yes.

Q. You think a person casually glances when he

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is getting in touch with a company with regard to moving?

A. Yellow page advertising, I think, is more or less based on the quick glance, yes. You try to attract the eye.

Q. How many phone calls did you have from Mr. Hutto on January 17, 52; more than one?

A. Oh, no, I think just—I believe he did call back and say that he had cancelled the order from National Transfer and confirmed the order with us. In the meantime I checked on the van situation and confirmed that we could have a van.

Q. You wrote a letter, or some one wrote a letter, under the date of January 11, 1952, to International Harvester Company, which is marked "O". The signature is LaVern Erspan. You had nothing to do with this particular letter, is that right?

A. I didn't write the letter. I opened the mail and reviewed the mail, and I gave the invoice to her to return.

Q. Yes. You mentioned in testifying, though, that it belonged to the National Transfer & Storage Company, is that right?

A. I was reasonably certain that it did, yes, from the fact that they didn't return it to us.

Q. How do you know that it didn't belong to some one else other than National Transfer & Storage Company?

A. Well, the name National was there. It was in

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connection with a moving company. I know of no other company that there could be confusion between. My logic would lead me to say National Transfer & Storage rather than Lyons.

Q. In other words, you don't know; you are only presuming?

A. Well, I wouldn't want to presume that it was Lyons when it was so evident.

Q. The fact is that you never checked with National Transfer?

A. No, I didn't check with National Transfer.

Q. The same applies to the letter of March 3, 1952, of National Van Lines, marked "P" by you to Transport Clearings of 150 California Street, "It is our opinion that your invoice is intended for National Transfer and Storage Company"? Now, was that invoice addressed to the National Transfer & Storage Company?

A. I believe it was, yes.

Q. Yes. The only question where they made a mistake, then, was on the address?

A. Addressing.

Q. Yes. I have just a couple of more questions. These memoranda, Mr. Adams, that you have testified here to today cover a period of approximately six to seven months, is that right; from January of '52 to about September of '52?

A. Yes.

Q. You left in May of 1953? A. Yes.

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Q. Were any other office memoranda sent by you after September of 1952 to May of 1953?

A. There may have been some. I think that we discontinued the practice, because we were so short-handed, and we thought that we had a file complete for—in other words, there seemed no further sense in taking the time to do them.

Q. I don't know if I got an answer to my question that I asked earler, and that is: How many outgoing calls would you make during your peak period from June 1st to September 30th, 1952?

A. How many outgoing calls?

Q. Yes; a day.

A. I think between 100 and 125.

Q. That's outgoing?

A. During the peak period.

Q. And you would receive and handle yourself, personally, between a hundred to a hundred fifty incoming? A. I didn't say 100 to 150, did I?

Q. So it would be a correct statement to say, then, that during that period of time when it was the peak period, you would handle as much as 300 calls a day?

A. I don't think I said that—said I would perhaps in a peak period——

Q. Handle approximately——

A. Handle—you said out calls?

Q. That's right.

A. Maybe a hundred to a hundred twenty-five.

Q. And that you would be involved in another

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hundred to a hundred fifty, approximately, of outgoing calls, right, that you, yourself, would handle?

A. No, I said just outgoing calls, a hundred to a hundred twenty-five.

Q. Maybe I misunderstood you, Mr. Adams. How many outgoing calls would you make a day during this particular period?

A. During this particular period?

Q. That's right; from June 1st to September 30, 1952.

A. I thought this period started in March.

Q. Well, I am confining it now to the period of June 1st. I thought you told me your peak period covered the summer months?

A. Oh, yes.

Q. So I am confining my question to that period.

A. And you want to know how many calls I would make out——

Q. That's right.

A. I would say a hundred to a hundred twenty-five in the peak period.

Q. So it would be fair to say, then, that during the peak period of June 1, 1952, to September 30, 1952, you would handle personally between a hundred and a hundred and twenty-five incoming calls, and would personally make approximately a hundred to a hundred fifty outgoing calls, is that correct?

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

A. A hundred to a hundred fifty outgoing calls?

Q. That's right.

A. I said a hundred to a hundred twenty-five outgoing calls.

Q. I am sorry if I misstated——

A. I will say this: Perhaps in a peak period the total in and out, I might have taken 200 a day, yes —in the very high peak period.

Mr. Whelan: I have no further questions.

/s/ R. W. ADAMS

State of California,
Northern District of California,
City and County of San Francisco—ss.

I hereby certify that on Saturday, the 12th day of June, 1954, at 1:30 o'clock p.m., before me, M. W. McGill, a notary public in and for the City and County of San Francisco, State of California, at Room 485, St. Francis Hotel, San Francisco, California, personally appeared pursuant to Notice of Taking Depositions, Robert W. Adams, called as a witness on behalf of the plaintiff; and Messrs. Wilkinson, Huxley, Byron & Hume, represented by Gerrit P. Groen, Esquire, appeared as attorneys for the plaintiff; and Howard B. Turrentine, Esquire, C. P. Von Herzen, Esquire, and S. L. Laidig, Esquire, represented by John J. Whelan, Esquire, appeared as attorneys for the defendant;

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

and the said Robert W. Adams being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there reported by me, a duly certified reporter and a disinterested person, and was transcribed by me; and I further certify that at the conclusion of the taking of said deposition, and when the testimony of said witness was fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him in my presence, and that the deposition is a true record of the testimony given by said witness.

And I further certify that the said deposition has been retained by me for the purpose of securely sealing it in an envelope and directing the same to the clerk of the court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal at the City and County of San

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Francisco, State of California, this 28th day of June, A.D. 1954.

[Seal] /s/ M. W. McGILL,

Notary Public in and for the City and County of San Francisco, State of California

[Endorsed]: Filed June 29, 1954.

PLAINTIFF'S EXHIBIT No. 50

[Title of District Court and Cause.]

DEPOSITION OF JOHN G. MORGAN

Appearances: Mr. Gerrit P. Groen and Mr. Kenneth T. Snow, for the Plaintiff. Messrs. Bair, Freeman & Molinare, by Mr. W. M. Van Sciver, for the Defendant.

Deposition of John G. Morgan, a witness of lawful age, taken on behalf of the plaintiff in the above entitled cause, wherein National Van Lines, Inc. is the plaintiff and Alfred E. Dean, trading under the firm name and style of National Transfer & Storage Company, is the defendant, pending in the District Court of the United States for the Southern District of California, Central Division, pursuant to the notice annexed hereto, before J. H. Catellani, a Notary Public in and for the State of Illinois, County of Cook, at Suite 1604, 38 South Dearborn Street, in the City of Chicago, State of Illinois, on the 2nd day of December, 1954.

Plaintiff's Exhibit No. 50—(Continued)

JOHN G. MORGAN

a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Groen:

Mr. Groen: Off the record.

(Discussion had off the record.)

Mr. Groen: Q. Will you please state your full name?

A. John G. Morgan, M-o-r-g-a-n, 3600 North Keeler Avenue.

Q. What business are you in, Mr. Morgan?

A. I'm in local storage and long distance business.

Q. That is the business of moving and storing furniture?

A. Yes; and long distance moving.

Q. And long distance moving? A. Yes.

Q. How long have you been in that business?

A. 34 years last July.

Q. Have you been in this business in various parts of the country, or only in Chicago?

A. All in Chicago. I went in the moving business July 6, 1920, for the Union Express Company.

Q. Now, Mr. Morgan——

A. Well, I was going to add to that.

Q. I'm sorry, I didn't mean to interrupt.

A. Then I went with Evanston Fireproof Storage. In 1932, I started my own business, and 1935,

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

incorporated. And I have been in that business up to now.

Q. Now, Mr. Morgan, I show you Plaintiff's Exhibit No. 1, which is a mark comprising the words National Van Lines with the vertical stripes with it. Are you familiar with that? A. Yes.

Q. How long have you known that composite mark—everything together?

A. Well, I have known Mr. McKee since about 1927.

Q. How long have you known that mark as shown here in Exhibit No. 1?

A. To my knowledge, about 1935, or 1936, something like that.

Q. You said that you are in the national—or the long distance—moving field, and are you familiar with many of the long distance movers over the country? A. Yes.

Q. Have you ever seen other long distance movers who use a mark having vertical stripes like that, and using the word National?

A. Never saw them.

Q. Does a mark of this character, including the word National in the stripe, mean more than one company to you, or just one?

A. National Van Lines, Inc.

Q. It means only National Van Lines?

A. That's right.

Q. And you have seen it that way since about 1935 or 1936? A. Yes.

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

Q. Have you seen it frequently?

A. I saw it as far back as I can remember.

Q. Have you seen it, you mean, since the first time that you saw it——that is, regularly?

A. That's right.

Q. Were you an agent for Allied Van Lines at one time?

A. No, I was a leased operator.

Q. A leased operator?

A. Yes. During the war, I operated two vans, sometimes four, for three years straight, leased to Allied from the East to West Coast, but I would have the privilege of breaking that lease.

Mr. Groen: You may cross examine.

Cross Examination

By Mr. Van Sciver:

Q. Did you ever hear of a company in Chicago by the name of National Shippers and Movers, Inc.? A. No.

Q. You say you know Mr. McKee quite well—the President of the plaintiff?

A. Yes. I never knew that name.

Q. Is it your recollection that the plaintiff here always used the name National Van Lines, Inc.?

A. That is as far as I can remember they did.

Q. And how far back would that be?

A. Well, I started doing business with him in about 1934.

Q. Not before 1934?

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

A. No. I was working for somebody else in this business, and I knew Mr. McKee way back when he was in the express business on Wells Street. He came up and formed that company. In fact, Mr. McKee and I both went into—at the same time—to prove our State rights—grandfather rights—however, at that time, he participated in the independent group and I pulled away from them and went with household goods carriers. I participated in that tariff for about a year, then I went back into the independent. So that has been our connection.

Q. Do you know when Mr. McKee formed his own company?

A. Well, I know just about when it was.

Q. I mean, approximately—about the—year it was?

A. Well, around about the first part of the '30's. That's as near as I can remember.

Q. Could it have been as early as October, 1928?

A. Well, yes, it could have been.

Q. I show you this page out of one of the official Government publications, marked Defendant's Deposition Exhibit No. 1. In the lower right-hand corner you will note the words "National Van Lines, Inc.", correct? You do see that there, do you not?

A. Yes.

Q. You will notice it says, "Claims use since October, 1928." Does that refresh your memory when you first may have seen this name?

A. Well, it could be, yes.

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

Q. Did you ever see——

A. I will tell you, I didn't pay much attention at first because we were right in a depression there, and I—I peddled coal for 35 cents a bag. I know what it was in those days. You were very lucky to retain a load those days. I went in and got my own interstate rights by myself, because I couldn't afford counsel.

Q. Did you ever see this mark used by National Van Lines, Inc. without a shield?

Mr. Groen: Counsel, may I inquire, do you mean shield or stripes?

Mr. Van Sciver: Q. Without the entire shield here shown in Plaintiff's Exhibit No. 1? In other words, did you ever see it used as shown in Defendant's Deposition Exhibit No. 1?

A. I drive the highway all the time. It is six years since I have had this; and I can see that emblem sometimes as much as a mile away, and we start blinking our lights when we see that, because we know it is perfect identification. They see my name up in the front of that truck. I see that emblem. Now, there is a slight resemblance in that emblem with Grey Vans off at a distance, but when it comes up to me, I see the difference.

Q. What does Grey Van Lines have?

A. They have a white side, but it is a gray van. Well, it's white in the center and something like a ball, but off at a long distance, we'll say about three-quarters of a block, the first impression comes to my

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

mind, "It could be National." Then when he gets up closer, it is easy to tell that it is Grey Van.

Mr. Groen: For the record, he is referring to the insignia, or mark, shown in Plaintiff's Exhibit No. 1.

Mr. Van Sciver: Yes.

Mr. Groen: He was referring to it right along.

Mr. Van Sciver: Q. Are you familiar with the shield of the United States Olympic Committee?

A. No. I'm just a mover.

Q. Well, I think there are a good many citizens who aren't athletes who are familiar with that shield? Do you ever go to any football games?

A. I don't like football. I like baseball.

Q. Baseball? Oh. Did you ever look at the insignia on the arms of National League and American League ball players?

A. I never took particular notice. All I notice is the play.

Q. Did you ever see a shield similar to the one on Plaintiff's Exhibit No. 1 on the uniform of big league ball players?

A. I never paid particular attention. I just pay attention to who he is, but I do look at that flag. I love that flag blowing up there.

Q. It is a fact that some trucking companies have patriotic reasons for using the Olympic shield on their trucks in order to get people interested in——

A. What do you mean by "olympic"?

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

Q. The olympic shield, sir, is exactly like this, sir, with the exception it has a couple figures instead of nationwide, and it is used by trucks.

A. The truckers don't use it at all.

Q. I understand it is put on trucks by trucking companies to get people to subscribe monies for the olympic games. Do you know that to be a fact?

A. Well, I don't know about that. If you look at—Well, I'm out on the highway; I never look at freight trucks — nothing but vans — because I'm primarily interested in them.

Q. Are you familiar with the shield of the President of the United States?

A. Do I have to answer that?

Q. Yes.

Mr. Groen: You may, if you want to. It is irrelevant, and I object to it as not having anything to do with the case.

The Witness: Well, I don't care to show my ignorance.

Mr. Groen: Off the record.

(Discussion had off the record.)

Mr. Van Sciver: Q. Are you familiar with the company National Van Lines of Milwaukee?

A. I only heard of them once. That was about a year ago—two years ago. They tried to steal a job from National Van Lines. This company—now, I heard this, I don't know. But they tried to negotiate to take this job away from National Van Lines, Inc. which I was the agent for to pick up in Miami,

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

Florida, and I finally got the job, which I was ordered to pick up, but this fellow that I took the job from, he told me that National Van Lines of Milwaukee, Wisconsin was trying to get the job away from me. That's the only time I heard of them.

Q. You say you are an agent for National Van Lines, Inc.?

A. I'm a booking agent and a leased operator for them. In other words, we exchange business.

Q. How long has that relationship been in existence? A. Since 1938.

Q. Just how does that relationship work? Give us a typical example of a transaction between the two companies?

A. Well, I lease my equipment to them.

Q. You do what?

Mr. Snow: He leases his equipment to them.

Mr. Van Sciver: Oh.

The Witness: All of my loads out of my limitations. Then there are other cases where I want National to handle a job for me. I turn it over to them, and they in turn handle it and they give me a commission for that. I in turn give them a commission for hauling on their paper.

Mr. Van Sciver: Q. Do you know Mr. Moss who testified in this case? That is Harold T. Moss?

A. No, I don't.

Q. Do you know Mr. Ross?

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

A. I have heard of him. I have had a little bit dealings with him a couple of times, that's all.

Q. Do you know if Mr. Ross's company is Union Van Lines?

A. Well, I have heard of it. I don't know. I don't know exactly what it is.

Q. Do you know if they have the same kind of arrangement with the plaintiff here?

A. I don't know. I wouldn't know what it is.

Q. Do you know if Transcontinental Van Lines does? A. Never heard of them.

Q. You have heard of the National Carloading Corporation, have you not?

A. Well, back years ago, we used to ship household goods crated through them. That is a Jensen—freight forwarding, that's all.

Q. How long back do you know that company?

A. Oh, I don't know how long. They came in after Jensen, I know that.

Q. After what?

A. Jensen Freight Forwarding. I think it was, oh, possibly 1938 or 1940.

Q. Did you know of a company operating out of New York by the name of National Moving and Warehouse Corporation? A. No.

Q. National Trailer Convoy, Inc., Oklahoma?

A. Never heard of them.

Q. National Freight, Inc., New Jersey?

A. No.

Q. National Truck Company, Florida?

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

A. No.

Q. National Air Transport, Inc., Chicago?

A. No.

Q. Did you know that——

A. I might have heard of the name, but I never gave it any thought—to any of them, for that matter.

Q. Well, isn't it a correct statement that the word National is a fairly common name in your business?

Mr. Groen: Objection to the question as irrelevant.

Mr. Van Sciver: Q. Aren't there quite a few companies that use that name now? The word National with some other phrase?

A. Well, I don't—Ask that question again, will you please?

Q. Aren't there quite a few companies at present in your business which use the word National as part of their corporate name?

A. I don't know of any one in particular.

Q. Well, are there quite a few, regardless of whether you know of any in particular? You do know that there are some, do you not?

A. Well, I do know of a National Cemetery.

Q. No, I mean in your business—in the moving—the trucking—business?

A. I don't know of anyone to speak of.

Q. Do you know of National Carloading Corporation, 1018 South Wabash?

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

A. I have heard of them, yes.

Q. National Van Lines, Inc.—that's the plaintiff here. Do you know of National Cartage Company, 1017 West 48th Street? A. No.

Q. You answer no? A. No.

Q. Do you know of National Freight Lines, 221 West Roosevelt? A. No.

Q. National Produce Carriers, 4241 South Halsted? A. No.

Q. Nationwide Carriers, Inc.?

A. Well, that word nationwide, you could connect that with black body carriers, something of that sort.

Q. No, this is the name of a company I am giving you. A. Never heard of them.

Q. National Cartage at 10014 South Kostner?

A. No.

Q. They are companies in Chicago, and you never heard of any of those?

A. I don't pay any attention to freight carriers.

Q. Isn't it true you know of National Van Lines, Inc. primarily through the——

A. I know of that through——

Q. Let me finish my question, sir.

A. Yes.

Q. ——primarily through your business relations with the company, and your acquaintanceship with Mr. McKee?

A. That's why I know them so well, because I know practically every officer they have ever had in

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

the company since they started. I have been in the moving business, associated with their company, because they do a good job. I have never turned a shipment over to National Van Lines yet that was ever mishandled. Our relationship has been absolutely good ever since we started with them, so, therefore, I am not interested in any other company. I don't bother to see what they are doing. I mind my own business.

Q. You think they're a pretty nice outfit then?

A. Yes. I don't think there is anybody in the moving business that's more capable of doing a first class moving job than National Van Lines is, unless it be Morgan.

Mr. Van Sciver: That's all.

Mr. Groen: Nothing further.

Mr. Van Sciver, with the consent of the witnesses, will you stipulate that we may waive the signatures?

Mr. Van Sciver: Yes.

Mr. Groen: Off the record.

(Discussion had off the record.)

Mr. Groen: May the record show that with respect to the exhibits offered by defendants during this session of depositions; namely, 1, 2 and 3, are not objected to on the basis of authenticity, or what they may show, but there is a definite objection on the basis of relevancy, as it is believed that this material is entirely irrelevant.

Plaintiff's Exhibit No. 50—(Continued)

(Deposition of John G. Morgan.)

State of Illinois,

County of Cook—ss.

I, J. H. Catellani, a notary public duly commissioned and qualified in and for the County of Cook, State of Illinois, do hereby certify that pursuant to the notice hereto annexed, there came before me on the 2nd day of December, 1954, at 3:15 o'clock p.m., at Suite 1604, 38 South Dearborn Street, in the City of Chicago, Illinois, the following named person, to-wit John G. Morgan, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing by me; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 7th day of December, 1954.

[Seal] /s/ J. H. CATELLANI,
Notary Public

[Endorsed]: Filed December 9, 1954.

PLAINTIFF'S EXHIBIT No. 51

[Title of District Court and Cause.]

DEPOSITION OF HAROLD T. MOSS

Appearances: Mr. Gerrit P. Groen and Mr. Kenneth T. Snow, for the Plaintiff. Messrs. Bair, Freeman & Molinare, by Mr. W. M. Van Sciver, for the Defendant.

Deposition of Harold T. Moss, a witness of lawful age, taken on behalf of the plaintiff in the above entitled cause, wherein National Van Lines, Inc. is the plaintiff and Alfred E. Dean, trading under the firm name and style of National Transfer & Storage Company, is the defendant, pending in the District Court of the United States for the Southern District of California, Central Division, pursuant to the notice hereto annexed, before J. H. Catellani, a Notary Public in and for the State of Illinois, County of Cook, at Suite 1604, 38 South Dearborn Street, in the City of Chicago, State of Illinois, on the 2nd day of December, 1954.

HAROLD T. MOSS

a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Groen:

Q. Will you please state your full name?

A. Harold T. Moss.

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

Q. And your address, Mr. Moss?

A. Home address? Q. Home address.

A. 6460 North Winchester Avenue.

Q. What is your occupation, Mr. Moss?

A. President of Transcontinental Van Lines, and Managing Director.

Q. Offices in Chicago?

A. In Chicago, yes, sir.

Q. Is that a moving and storage business?

A. Long distance moving and storage business.

Q. How long have you been with them?

A. Four years.

Q. Were you in the moving and storage business prior to that? A. Yes.

Q. How many years?

A. Total of 20 years, about.

Q. And in what other parts of the country have you worked?

A. In New York and Chicago.

Q. And were you usually in an executive capacity? A. Yes, sir.

Q. I'm showing you Plaintiff's Exhibit No. 1 attached to the complaint, and ask you if you are familiar with that mark comprising that name and insignia? A. Yes, I am.

Q. You are? A. Yes.

Q. How long have you been familiar with that and seen it? A. I would say since 1934.

Q. Do you know whom it represents?

A. National Van Lines.

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

Q. And do you know this while you were in New York?

A. Yes, sir, I did. They had their office in the same building we had ours, and their trucks parked in the same lot as ours did—the company I was with at the time.

Q. Have you seen it continuously since the first time you saw it in 1934? A. Yes, sir.

Q. Have you any idea how long the marks and the stripes together have been in the field?

A. Yes, sir, they have been in the field since 1934, that I know of.

Q. You are speaking of the storage and transfer field?

A. Yes, sir—in our own industry.

Q. And have you ever seen a mark similar to that used by others with the stripes?

A. Yes, I have.

Q. Whose was it?

A. National Transfer & Storage of San Diego —Dean Van Lines.

Q. Also known as Dean Van Lines?

A. Yes.

Q. When did you first see that?

A. To the best of my recollection, I would say the early part of this year—say April or May of this year. I am not certain as to the exact date.

Q. When you say you first saw that, are you referring to the whole mark—the name and stripes?

A. The stripes.

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

Q. You saw the whole thing first at that time, or did you see the stripes first at that time?

A. I saw the whole thing.

Q. You didn't see the name, National Transfer & Storage, or Dean Transfer & Storage before?

A. No.

Q. Where was it you saw this National Transfer & Storage mark?

A. They backed into our warehouse to unload a shipment for storage or transit, and at the time they were backing in, I thought it was a National Van Lines truck.

Q. What made you think so?

A. On account of the emblem on it—this striped affair.

Mr. Groen: You may cross examine.

Cross Examination

By Mr. Van Sciver:

Q. Mr. Moss, you say that you have been in the moving and storage business, is that correct?

A. That's right, sir.

Q. Since 1934? A. Yes, '34.

Q. So that when you started in that business—— A. Yes, sir.

Q. ——what company were you with in New York?

A. I was in New York with Union Van System, an associate company of Transcontinental Van Lines at 4015 Broadway in Chicago, and after that,

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

I was with the Lexington Moving and Storage Company, and managed it. I left the Union Lines and came back there. I was with another company, too.

Q. What other company were you with?

A. Concord Storage and Transfer.

Q. And where were they located?

A. In the Bronx, New York.

Q. While you were in New York, did you ever hear of a company by the name of National Moving and Warehouse Corporation?

A. Yes, sir, I did.

Q. When did you first hear of that company?

Mr. Groen: Object to that line of testimony as being irrelevant.

The Witness: Do you want me to answer the question, sir?

Mr. Groen: Yes.

A. I know that company since—well, I would say, almost 15 years. I would say National Moving and Warehouse Corporation—is that what you said?

Mr. Van Sciver: Q. Yes.

A. That's right, they were in the Bronx, New York, too. I wouldn't be certain as to the exact—I think it is 15.

Q. Did you ever hear of a company by the name of National Van Lines that operated out of Milwaukee? A. Yes, sir.

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

Q. How long back did you hear of that company?

A. That company I heard of—I heard of that company back to, I would say, about the war time, say about 1940.

Q. Did you ever hear of a company by the name of National Trailer Convoy, Inc.?

A. That, I don't know, sir.

Q. Out of Oklahoma? A. No, sir.

Q. National Freight, Inc. in New Jersey?

A. No, sir.

Q. National Truck Co., Florida?

A. No, sir.

Q. It is true, at the time you entered this business, that you knew of many other companies not necessarily in the moving and storage business, that used the name National as part of their corporate name?

A. Perhaps, vaguely; being outside of their industry, not taking too much notice of them—occasionally, say. The names you mentioned don't strike a bell at the moment, except those in our own industry.

Q. Do you know at the present time there are over twelve hundred companies listed with the name National in the New York telephone directory?

A. No, sir, I didn't know there were that many.

Q. Do you know that in the Chicago directory,

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

there is over five hundred companies with the name National?

A. I didn't know that, no. It never entered my mind.

Q. Did you know of any companies in the moving, storage, freight forwarding, or trucking field with the name National at the time you started in this business? A. Yes.

Q. And what were they?

A. National Movers of Boston, and National Movers of New York.

Q. Those two companies were in existence at the time you started in the business in 1934, is that correct?

A. Around that time, I would say so, or 1935, perhaps. I think the National Movers of Boston was about 1934, but the National Movers of New York was about '35 or '36. I am not too certain of that date. Time flies.

Q. Were National Movers of Boston actually in the business when you started in it?

A. Yes, I would say they were.

Q. Do you know how far back they went before you entered the business?

A. No. The reason I got acquainted with them is when the Government took over the industry under the National Commerce Act, they were, perhaps, in the business five years previous to that. I am not certain. I just knew the owner of the company.

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

Q. Did you ever hear of a company by the name of National Air Transport? A. No.

Q. Did you ever hear of a company by the name of Piehl, P-i-e-h-l, Transfer and Storage Company of Portland, Oregon? A. No, sir.

Q. Never heard of it?

A. No, not to my recollection. At this time, I would say not.

Q. Referring to Plaintiff's Exhibit No. 1, which is the trademark registration, you were asked on direct examination if you had seen that shield in connection with the defendant's trucks, were you not? A. Yes, sir.

Mr. Groen: I think I said the stripes.

Q. Did I not? A. Yes, sir, the stripes.

Mr. Van Sciver: All right.

Q. When did you see that?

A. To my knowledge, about April or May of this year. I am not certain, just a fleeting glimpse. It struck me—I thought it was one of McKee's trucks, and it was one of these Dean Van Lines. I didn't pay attention to it.

Q. Was the shield on the Dean truck the same as the National shield?

A. It would seem to me it was at the time, sir. It would seem that way.

Q. Isn't it a fact that the shield on the Dean trucks is in the form of a map of the United States, rather than a shield?

A. Gosh, I don't know. On this particular truck,

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

they were associated with Howard Van Lines, and they might have had Howard Van Lines on half. I didn't pay particular attention to that.

Q. You don't recall, of your own knowledge, whether it was a shield or map of the United States?

A. To the best of my recollection, I would say it was a shield. It seemed to me that way. It had the stripes. To me it seemed to be a National Van Lines piece of equipment, but, as I say, I wasn't too interested at the time.

Q. Are you familiar with the shield used by the Union Pacific Railroad?

A. I should be, but at this time—I have seen it but it is almost similar to one of these. I don't know exactly now.

Q. Well, isn't it a fact that it is substantially the same as the shield shown in Plaintiff's Exhibit No. 1?

A. That, I wouldn't know. I wouldn't know that much about the picture of the Union Pacific shield as compared to the National Van Lines. That, I wouldn't know.

Q. Do you remember if the Union Pacific shield has vertical stripes on it?

A. I honestly don't know. I should know, but I don't. I just can't visualize it for the moment. I should know it because I have done business with Union Pacific and have had their correspondence and catalogs in the office, and literature. It would

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

vaguely seem to be a shield of that kind, but I am not too certain.

Mr. Van Sciver: Off the record.

(Discussion had off the record.)

Mr. Van Sciver: Q. Mr. Moss, are you familiar with the shield of the United States Olympic Committee? A. No, sir, I would say not.

Mr. Groen: I object again to this line of testimony as being irrelevant.

Mr. Van Sciver: Q. Are you familiar with the shield of the President of the United States?

A. Well, I would say yes.

Q. And isn't it substantially identical with the shield shown in Plaintiff's Exhibit No. 1?

A. Well, it—I don't think there is too much of a close resemblance from my—some part of the structure, apparently, has similar resemblance, but not the entire structure of it.

Q. Do you recall that the vertical stripes are present in both?

A. It would seem that way to me, sir, yes.

Q. And isn't it true that the vertical stripes in both cases are red and white?

A. Perhaps, yes. I don't know.

Q. Isn't it also a fact that many moving, storage and freight companies use a map of the United States in their advertising or on their trucks?

A. Some do. Some do, to my recollection. United Van Lines—I used to work with them—they had a map of the United States in their advertisements

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

and on their trucks. They possibly took it off. I don't know if they have it on there now or not.

Q. It is a fairly common thing in the trucking and moving business, is it not—if not on the trucks themselves, in advertising and telephone directories?

A. It is in the telephone directories to convey to the general public they go all over the United States, so they include a map in their advertisement. In our own industry; I don't know about the freight industry.

Mr. Van Sciver: I would like to have this marked as Defendant's Deposition Exhibit No. 1, for identification.

(Document marked as requested.)

Mr. Van Sciver: First I would like to ask Mr. Groen if he would stipulate that this is—subject to correction—a photostat of the Official Gazette, United States Patent Office—Official Gazette, page 651, June 17, 1952.

Mr. Groen: I so stipulate.

Mr. Van Sciver: To which I have added in pencil the date of issue of registration number 563,950.

Mr. Groen: I assume that is all correct. There is no dispute about that.

Mr. Van Sciver: Q. Mr. Moss, down in the lower right-hand corner of Defendant's Deposition Exhibit No. 1, for identification, there is a publication of a trademark, National Van Lines, Inc., owned by National Van Lines, Inc. who is the plaintiff in

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

this present suit. You will note that that does not include the shield, correct? A. Right.

Q. Have you ever seen the National Van Lines, Inc. as shown in Defendant's Deposition Exhibit No. 1, for identification, used on any trucks of the plaintiff without the shield?

A. I would say not. The reflection to my mind from the long years of knowing the company and seeing the equipment continuously, it reflected the shield at all times, and was synonymous with the name National Van Lines. That was always in the back of my head though I didn't know too much about it in New York or here.

Mr. Van Sciver: I would like to have the reporter mark Defendant's Deposition Exhibit No. 2, the cover page for the June, 1954 Chicago Telephone Directory, and pages 1343, 1344, and 1345, and I will ask Mr. Groen if he will stipulate, subject to correction, that those are true and correct photostatic copies of those pages of the Chicago Telephone Directory?

Mr. Groen: Yes, I'm sure they are.

(Documents marked as requested.)

Mr. Van Sciver: Q. You will note, Mr. Moss, I believe, that there are—The word National appears continuously on practically all of those three pages, correct? A. Correct, sir, yes, sir.

Mr. Van Sciver: I would like to mark—have the reporter mark—as Defendant's Deposition Exhibit No. 3, for identification, the cover page—make that

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)
3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, pages 727, 1208, 1212, 1213, 1215, 2009 and 2019 of the Chicago Red Book, classified telephone directory.

(Documents marked as requested.)

Mr. Groen: Let me state for the record here, that I think this is completely irrelevant as far as this witness is concerned, and if counsel wishes to get them in as for whatever they say, and they state on their face whatever they stand for, and I think it is irrelevant as far as this witness is concerned.

Mr. Van Sciver: All right. I will offer them in evidence, but there are a couple questions I would like to ask him about this Red Book.

Mr. Groen: I think it is beyond the scope of the direct.

Mr. Van Sciver: He already mentioned he has seen maps of the United States.

Mr. Groen: Don't the exhibits speak for themselves, Mr. Van Sciver?

Mr. Van Sciver: Well, we will just take one that you did not mention.

Q. Look at page 1213. Is it not a fact that the Jensen Movers show a map of the United States in their ad?

A. Yes. I did notice that until now.

Q. Now, is it not a fact that the term nationwide is one used rather extensively in the trucking business today?

A. In our industry, yes.

Q. And it has been for some time?

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

A. Apparently so, sir.

Q. I don't believe you stated your age, sir?

A. Fifty-three.

Q. You were born around 1903?

A. July 4, 1901. I was 53 July 4th.

Q. So, in 1928, you were about 27?

A. 27, that's right.

Q. What business were you in then?

A. At that time I was supervisor for the Metropolitan Life Insurance Company.

Q. Where? A. In Philadelphia.

Q. At that time, did you know of any companies in the moving or trucking business that used the name National?

A. I would say no, not at that time, no. Just since 1934.

Q. Were you a native Philadelphian?

A. I am a native Pennsylvanian. I come from the east part of Pennsylvania.

Q. Did you ever hear of National Freight, Inc.? They operate in New Jersey.

A. No, sir. Not to my present knowledge. I would say no.

Mr. Van Sciver: That's all.

Mr. Groen: Just two short questions, Mr. Moss:

Q. Showing you this exhibit, Exhibit No. 4 to plaintiff's amended complaint, is that the striped design you saw on the truck of Dean?

A. Yes.

Q. It is? A. Yes, sir.

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

Q. In connection with these other nationals you referred to—firms by the name of National in the moving business, other than National Van Lines, and Dean's—did you ever see the word National with the striped design? A. No, sir.

Mr. Van Sciver: Let me ask you just one question—probably——

The Witness: Okay.

Mr. Van Sciver: Q. You apparently didn't observe this truck insignia very closely that you saw on the load that you testified about, is that correct? —this Dean insignia?

A. I would have to explain this a little more to you. With my knowledge of this National Transfer & Storage Company—I knew this company in general in New York. It seemed to me he always reflected some sort of emblem which was part of National Van Lines. It seemed to me they were part of National Van Lines. In shipping by railroad, Union Pacific shipped big things for the National industries, and a railroad may have come to National Storage in San Diego; and in their correspondence it seemed to me it was reflected, this emblem, which sort of confused me at the time. I never paid direct attention to it. In the advertisement in the D. & W.—Distributors and Warehousemen—they are listed as receiving agents.

Mr. Groen: Q. Who is listed?

A. The National Transfer & Storage Company.

Mr. Van Sciver: Q. Well, the map of United

Plaintiff's Exhibit No. 51—(Continued)
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States and a shield of the type shown in Plaintiff's Exhibit No. 1, are certainly different, aren't they?

Mr. Groen: I object to the question, because we are talking about the stripes, not the outlines.

Mr. Van Sciver: Well, I'm talking about the outlines.

Q. They are different, aren't they?

A. Well, apparently they are. I don't know.

Mr. Van Sciver: Okay.

Mr. Groen: That's all.

State of Illinois,
County of Cook—ss.

I, J. H. Catellani, a notary public duly commissioned and qualified in and for the County of Cook, State of Illinois, do hereby certify that pursuant to the notice hereto annexed, there came before me on the 2nd day of December, 1954, at 2:20 o'clock p.m., at Suite 1604, 38 South Dearborn Street, in the City of Chicago, Illinois, the following named person, to-wit Harold T. Moss, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing by me; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 7th day of December, 1954.

[Seal] /s/ J. H. CATELLANI,
Notary Public

[Endorsed]: Filed December 9, 1954.

PLAINTIFF'S EXHIBIT No. 52

[Title of District Court and Cause.]

DEPOSITION OF JOSEPH S. ROSS

Appearances: Mr. Gerrit P. Groen and Mr. Kenneth T. Snow, for the Plaintiff; Messrs. Bair, Freeman & Molinare, by Mr. W. M. Van Sciver, for the Defendant.

Deposition of Joseph S. Ross, a witness of lawful age, taken on behalf of the plaintiff in the above entitled cause, wherein National Van Lines, Inc. is the plaintiff and Alfred E. Dean, trading under the firm name and style of National Transfer & Storage Company, is the defendant, pending in the District Court of the United States for the Southern District of California, Central Division, pur-

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

suant to the notice hereto annexed, before J. H. Catellani, a Notary Public in and for the State of Illinois, County of Cook, at Suite 1604, 38 South Dearborn Street, in the City of Chicago, State of Illinois, on the 2nd day of December, 1954.

JOSEPH S. ROSS

a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Groen:

Q. Will you state your name, please?

A. Joseph S. Ross.

Q. And your home address, Mr. Ross?

A. 3526 Pine Grove.

Q. And what is your business, Mr. Ross?

A. Moving and storage.

Q. How long have you been in that business?

A. I have been in the business about 25 years.

Q. What is the name of your present organization? A. The Union Van Line, Inc.

Q. Are you an officer? A. Yes.

Q. What office do you hold?

A. I hold the Presidency over there.

Q. And do they have offices in Chicago?

A. Oh, yes.

Q. And how long have you been with the Union company? A. Ever since I started it.

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

Q. How long ago? Just roughly.

A. I would say I started the Union in January in 1933.

Q. You say you have been in this business about 25 years? A. That's right.

Q. Transfer and storage business?

A. Yes. Prior to that, I worked for a company in the moving business.

Q. Will you give us a little history of that? What companies you were with and their locations.

A. The Continental Van Lines, Philadelphia, Pennsylvania. In 1933, I started my own business —in 1933. Incorporated in 1934, I think.

Q. I take it you are familiar with the transfer and storage business on a national basis; that is, coast to coast? A. Oh, yes.

Q. I'm showing you Plaintiff's Exhibit No. 1 as attached to its complaint, which illustrates a mark, and ask you if you are familiar with that?

A. Oh, yes.

Q. Will you tell me all that stands for?

A. That is their trademark, the National Van Lines.

Q. What is the outstanding thing about that?

A. That is.

Q. You are pointing to the vertical stripes?

A. Yes.

Q. And what else?

A. The National Van Lines there.

Mr. Van Sciver: Excuse me. I believe the wit-

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

ness is pointing—I don't like you to put words in his mouth. Maybe you would ask what he was pointing at?

Mr. Groen: Yes.

Q. What were you pointing to?

A. I was pointing to the National Van Lines and this emblem.

Q. What is that emblem?

A. This is a striped emblem, red and white.

Q. And this appears to be black and white on this print? A. That's right.

Q. How long have you been familiar with that mark there, say the words and striped design?

A. I think since, oh, 20 years I know of. I think since about 1930.

Q. I'm speaking of the one for the National Van Lines, the plaintiff in this case?

A. Yes.

Q. And you are speaking of knowing about this for 20 years?

A. Yes, 20 years. I have known this firm and did business with them.

Q. Would you say it is a rather popular mark in your business?

Mr. Van Sciver: I object to that.

Mr. Groen: Let me rephrase the question:

Q. Is this mark well known in the trade today?

A. That's right, it is.

Q. Do you know of any other marks in the moving and storage business—this particular business—

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

that combine the word National with the vertical stripes? A. No, I don't.

Q. Have you seen anything like that lately?

A. Only on the National Van Lines.

Q. Now, in all your work in this field of moving and storage, which you say has been about 25 years in the various parts of the country, you don't know of anyone having used that combination?

A. I don't know of any, no.

Mr. Van Sciver: Objection as leading.

Mr. Groen: Q. Well, have you ever seen anyone use the word National and the vertical stripes together? A. No, sir.

Q. Now, I'm showing you Exhibit No. 4, for plaintiff, attached to the amended complaint, which is another insignia or mark, National Transfer & Storage. Have you ever seen that before?

A. No, sir.

Q. Does it look familiar to you?

A. No, it looks to me like——

Mr. Van Sciver: No, he said he never has seen it.

Mr. Groen: Q. Does it remind you of any marks?

A. No. The only one I know is the National Van Lines.

Q. Would you say that, in your opinion, based on your work in this field, it looks close to that of National Van Lines.

Mr. Van Sciver: Objection.

Mr. Groen: His opinion.

Plaintiff's Exhibit No. 52—(Continued)
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Mr. Van Sciver: He is not qualified as an expert.

Mr. Groen: I think the record shows he has been in the moving and storage business for 25 years, and he is familiar with the various organizations in the transfer and storage business, and I am asking him, based on that, whether in his opinion he believes——

Q. If there is any similarity between the two marks, Exhibit No. 1 of the complaint and Exhibit No. 4 of the amended complaint?

A. Had I seen it, probably it would. It would confuse you a little bit, you know, but all I know is the National Van Lines using it. I have never seen it before.

Mr. Van Sciver: I move to strike the answer and the question.

Mr. Groen: You may cross examine.

Cross Examination

By Mr. Van Sciver:

Q. Mr. Ross, you have testified that you had seen the trademark shown in Plaintiff's Exhibit No. 1 since around 1930?

A. That's right, correct.

Q. You will note that this registration, which is an official document put out by the United States Government Patent Office—— A. Yes.

Q. ——contains in the last paragraph, the state-

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

ment of the first use of this mark. Do you notice that? A. Yes, sure.

Q. And what year does it say it was used first?

A. It says here 1934, but they used it prior to that. That is the way I remember.

Q. I show you a page from a—also happens to be an official publication of the United States Government, and, incidentally, I would like to offer this if I——

Mr. Groen?

Mr. Groen: Yes, that is perfectly all right.

Mr. Van Sciver: That is Defendant's Deposition Exhibit No. 1.

Q. You will notice in the lower right-hand corner there is a National Van Lines, Inc. without the shield shown in Plaintiff's Exhibit No. 1, correct?

A. That is correct, sir.

Q. Did you ever see that mark used without the shield?

A. No, I don't remember that. That's so far back that I can't remember it exactly, no.

Q. Now, you say that you were in the moving and storage business and your own business for about 25 years, but prior to that time, you worked for Continental Van Lines?

A. That's right, prior to 1933 I worked for—I started our own business about 1933.

Q. And how long had you worked for Continental?

A. About 3 or 4 years, something like that. I

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

don't remember exactly—you know—to be correct on that. That is so far back that sometimes you——

Q. I understand.

A. It is a year one way or the other, you just can't come right out.

Q. Well, were you in the moving and storage business prior to the time you worked for Continental? A. No, I wasn't.

Q. What business were you in before that?

A. Well, I was a salesman and on the road—traveled.

Q. In what territory?

A. All over the country.

Q. Where were your headquarters?

A. In New York City—New York, Philadelphia.

Q. I think you said when you were with Continental, you were in Philadelphia?

A. No, I was in Chicago. I started in Philadelphia for them—they were a Philadelphia concern—and then they asked me to transfer to Chicago, and take charge of their office here. That's how I became acquainted with Mr. McKee of the National Van Lines, and I don't know whether you are familiar with this business, but although I was in the Continental, and sometimes we would get loads where we don't have a truck that has to be dispatched, wherever the destination is supposed to be, and we will get orders from the office, "See if you can't dispose of it with other carriers who go in that territory," and I used to go to McKee and

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

sell him loads. In our line of business, we call that, "to broker it."

Q. You have been in the business then since around 1929, is that correct?

A. No, about—around that, yes, probably around 1929, 1930, I don't remember exactly. 1929? It probably is that long.

Q. Was it before the depression? Before the stock market crash?

A. As it happened, I came into the depression —that is what put me in the moving business. The depression made me move so much, I figured it was cheaper to go into the business. I fooled them.

Q. At the time that you went into this business, you knew, as a fact, did you not, that there were many, many companies, other than in the trucking business, perhaps, which used the name National in their firm name?

Mr. Groen: Just a moment. I want to enter an objection in the record that this is irrelevant, beyond the scope of the direct.

Mr. Van Sciver: Q. Go ahead.

A. Not in the moving business.

Q. No, I said in any business—other businesses you knew — there were many businesses uses the word National?

A. Freight business. I don't remember that.

Q. Other than the moving and freight business?

A. All I was interested in—I really don't know

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

outside the moving business. There was probably, but I don't remember.

Q. Do you remember National Dairy Company of New York?

A. No, I don't really know.

Q. National Transit Company in Washington?

A. National Transit in Washington? No. There was a National Delivery in Washington.

Q. When was that?

A. That was about the time—oh, it was in 1929. Sure. Morris—what was his name? National Delivery, yes.

Q. That was in Washington in 1929?

A. Yes. Prior to that. I think they started in 1925, if I am not mistaken. National Delivery.

Q. What was their business?

A. Moving household goods.

Q. Are you familiar with the shield that is used by the Union Pacific Railroad?

A. Yes. I have seen it on the Union Pacific matters going out of Omaha. I traveled on the trains.

Q. Isn't that a shield that is in the shape of the shield shown in Plaintiff's Exhibit No. 1?

A. Well, Mr. Van Sciver, if I am correct, they are black and yellow.

Q. What are the stripes, yellow and red?

A. Or yellow and red. I wasn't sure.

Q. And the configuration of the shield, is that substantially the same?

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

A. I wouldn't want to say that.

Q. It is a shield?

A. It is a shield, oh, yes.

Q. Are you familiar with the shield of the United States Olympic Committee?

A. Yes.

Q. It is similar to the shield of the one in Plaintiff's Exhibit No. 1, too, is it not?

A. I don't remember exactly.

Q. Do you remember it as red and white stripes —vertical stripes?

A. Maybe. I don't remember. I don't remember that so well.

Q. Are you familiar with the shield of the President of the United States? A. Oh, yes.

Q. It is similar to the shield shown in Plaintiff's Exhibit No. 1, is it not? A. Yes.

Q. It likewise has vertical red and white stripes, has it not? A. Yes.

Q. It is a fact, is it not, that in your business many companies use a map of the United States in their advertising?

Mr. Groen: Object to the question again as irrelevant. The map is not an issue.

Mr. Van Sciver: You may go ahead and answer.

A. Yes, some use a map.

Mr. Van Sciver: Q. Of the United States?

A. Of the United States.

Q. Do some of them use it in telephone classified directory advertising, to your recollection?

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

A. I think—I would say yes. I haven't seen any lately, I will tell you.

Q. Well, just to refresh your memory, we will show you here, Defendant's Deposition Exhibit No. 3, which is a 1953—December, 1953—Chicago Classified Directory.

A. The Red Book, yes.

Q. In 3-C of that exhibit, do you find a map of the United States here? A. Calders.

Q. C-a-l-d-e-r-s. And on 3-D, do you find there the phrase, "Local and nationwide padded van service"?

A. Well, that is very common. It has been used in lots of advertising—nationwide.

Q. Nationwide?

A. For Knowles, yes.

Q. And on 3-E, you will find a map of the United States for Jensen? A. Yes.

Q. So, after looking at this, it is true, is it not, that the United States map is used quite frequently in your business as an advertising symbol?

A. Yes, I would say it is. Mr. Van Sciver, a good many of them use anything. Here is mine.

Q. Yours itself has a map of the United States, does it not?

A. I don't think so, not the Union Van Line.

Q. Also referring to page 2019, which is Exhibit 3-H, under trucking, there are several national companies you saw—with national in their name—are there not?

Plaintiff's Exhibit No. 52—(Continued)
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A. That's National Cartage. They are not in the moving business.

Q. National Freight Lines, also?

A. They are not in the moving business, of course—National Freight Lines. National Produce. Well, there's a lot of them use National.

Q. It is a fairly common name?

A. Common name.

Q. Did you ever hear of a company by the name of National Van Lines operating out of Milwaukee?

A. Yes.

Q. That has no connection with the Plaintiff here, correct? A. No, sir.

Q. When did you first hear of that company?

A. I would say I know National Van of Milwaukee about—also over 20 years. Yes. About—Abe Mechanic—I know him, I would say, about, over 20 years.

Q. Did you know that company when you started your business in 1933?

A. Yes, I did. He was sort of an agent for us, you know. He gives some business. I know him very well.

Q. Did you know of the company prior to 1933?

A. Well, the only one is National Delivery of Washington, D.C.

Q. No, I mean, did you know of National Van Lines of Milwaukee, prior to 1933?

A. No, I did not.

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

Q. It was when you got into the business you knew of them?

A. Yes, when you get around.

Q. Did you know a company by the name of National Carloading Corporation?

A. National Carloading? Yes. Jensen's.

Q. How far back did you know of them?

A. I have known of them quite some time.

Q. At the time you entered the business?

A. Yes.

Q. Before you entered the business?

A. No. I had no occasion.

Q. When I say, "You entered the business," I am talking about when you started your company.

A. Well, then I knew them. I would say about 20 years, something like that.

Q. Did you know them prior to 1933 when you started your company?

A. I heard of them. I did not know them.

Q. Did you know of a company by the name of National Moving and Warehouse Corporation in New York? A. Yes, sir.

Q. Did you know of them before 1933?

A. Oh, yes, but they were then known as National—I don't remember. I knew them very well. I know them now, too. National Van Lines of New York.

Q. No, the name is National Moving and Warehouse Corporation.

A. I think they have been in business—he was

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

under a different name, but I think he has been in the business now 12 or 14 years, something like that.

Q. Did you know of a company by the name of National Trailer Convoy, Inc., operating out of Oklahoma? A. No, sir.

Q. National Freight, Inc. out of New Jersey?

A. No, sir, I did not.

Q. National Truck Company out of Florida?

A. No, sir.

Q. Did you ever hear of a company by the name of National Shippers and Movers, Inc. in Chicago?

A. National Shippers and Movers—and Movers —you say, in Chicago?

Q. Is your answer no?

A. No, I don't know of National Shippers and Movers. I never——

Q. Isn't it a fact that the plaintiff here, the National Van Lines, Inc. at one time used that name? A. I don't remember that, sir.

Q. You don't remember that? A. No.

Mr. Van Sciver: That's all.

Mr. Groen: Just one question, Mr. Ross:

Q. You testified about other firms in the furniture moving and storage business that at one time or other — maybe presently — have used the name National in connection with their corporate name. Now, forgetting National Van Lines, the plaintiff, and National Transfer & Storage, the defendant in

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)
this case, do you know of any other companies that use the vertical stripes along with national?

A. No, sir.

Mr. Groen: That's all.

State of Illinois,
County of Cook—ss:

I, J. H. Catellani, a notary public duly commissioned and qualified in and for the County of Cook, State of Illinois, do hereby certify that pursuant to the notice hereto annexed, there came before me on the 2nd day of December, 1954, at 2:45 o'clock p.m., at Suite 1604, 38 South Dearborn Street, in the City of Chicago, Illinois, the following named person, to-wit Joseph S. Ross, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing by me; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

In witness whereof I have hereunto set my hand and affixed my notarial seal this 7th day of December, 1954.

[Seal] /s/ J. H. CATELLANI,
Notary Public

[Endorsed]: Filed Dec. 9, 1954.

PLAINTIFF'S EXHIBIT No. 54

[Title of District Court and Cause.]

DEPOSITION OF ALFRED EDWARD DEAN

the defendant herein, taken on behalf of the plaintiff, at Suite 725, 453 South Spring Street, Los Angeles, California, on Monday, June 14, 1954, at 10:00 o'clock a.m., before E. L. Drummond, a Notary Public within and for the County of Los Angeles, State of California, pursuant to the annexed Notice to Taking Depositions.

Appearances of Counsel: Gerrit P. Groen, 38 South Dearborn Street, Chicago, Illinois, and Albert J. Fihe, 1023 Victory Place, Burbank, California, appearing on behalf of the plaintiff. Howard B. Turrentine and C. P. Von Herzen, Suite 725, 453 South Spring Street, Los Angeles, California, appearing on behalf of the defendant.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

ALFRED EDWARD DEAN

the defendant herein, called as a witness on behalf of the plaintiff, having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Groen:

Q. State your full name and address, Mr. Dean.

A. Alfred Edward Dean, 1505 Via Montemar, Palos Verdes Estates, California.

Q. Your occupation? A. Executive.

Q. In what?

A. In the moving and storage business.

Q. In what capacity? Will you explain that more fully?

A. Well, just general administrative capacity of my business.

Q. What moving and storage business?

A. Dean Van Lines and/or National Transfer & Storage Co.

Q. You say Dean Van Lines and/or National Transfer & Storage Co. Is that a corporation?

A. No, it is not. It is an individual ownership.

Q. Who is the owner? A. Myself.

Q. When was this business as you identify it now first established? A. October 1944.

Q. Under what name?

A. Originally under the name of National Van & Storage, and subsequently under the name of National Transfer & Storage, and then lastly under

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

the name of Dean Van Lines and/or National Transfer & Storage.

Q. Let's get this straight. In 1944 your business was first organized? A. That is right.

Q. The first name you used was National——

A. Van & Storage.

Q. How long did you use that?

A. Oh, I don't recall exactly. Not too long.

Q. Would you say it was over a year or was it months, or what?

A. Oh, I would hazard a guess, possibly a year.

Q. What was the next name?

A. National Transfer & Storage.

Q. Company, Co.? A. Yes.

Q. When did you start using that name?

A. About the same time, I think.

Q. You used two names?

A. No, used the one. We discontinued using the Van & Storage at the time we began using the name "National Transfer & Storage."

Q. And you are still using "National Transfer & Storage" today? A. That is right.

Q. What was the other name you said you were using? A. Dean Van Lines.

Q. How long have you been using that and when did you first adopt it?

A. Oh, there again I don't have the exact dates. I would have to refer to the records, but I would say I have been using it for approximately a year or year and a half.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. Did you enter into a contract with National Van Lines, Inc., on or about November 7, 1944, to act as their agent in the transfer and storage business?

A. I don't recall the exact date. I did enter into an agency agreement with them, yes.

Q. Did you ever see the Agreement that was attached to the Complaint in this case, a copy of the Agreement? A. I don't recall.

Q. Was any change made in your name at the time you entered into this agreement, which was on or about December, or November 7, 1944?

A. Well, it was the document itself, I am referring to the agency agreement itself, that prompted me to change my name to "Transfer & Storage" from "Van & Storage," and I remember doing it to try to avoid any possible similarity of names.

Q. You started out as National Van & Storage?

A. That is right.

Q. You changed to National Transfer & Storage. Did that change take place before or after?

A. It took place after we had executed this agreement.

Q. In connection with the display of that name, when did you first adopt the insignia which is illustrated by Plaintiff's Exhibit 4, which I am showing you, attached to the Complaint?

A. There again it would be a guess. I think about 1950 or '51.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. 1950 or '51? A. Yes.

Q. When you first started using that insignia, which comprises alternate red and white stripes in the original, which show as black and white here, were you then an agent of the National Van Lines, Inc.?

A. I don't recall. I don't believe so.

Q. Would your records show that?

A. I think the records would, yes.

Q. Have you records to show when you first used this design, with that trade name and design? I am speaking of the design comprising the outline with the stripes.

A. I think so. I think we have probably duplicate records.

Q. What was the occasion for adopting this design along with the name?

A. Oh, my feeling that it had a lot of trade-mark value, and I think that practically every company has some sort of trade-mark to identify their service.

Q. Are you speaking now of the design trade-mark alone or with the name?

A. I am speaking of the trade-mark, yes.

Q. I was solely referring to the character of the two designs or shields. I am questioning you with respect to that.

A. The design, I didn't change the design. I just now answered that.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. You adopted the design comprising stripes about 1950 or 1951, you said?

A. That is right.

Q. Would your records show certainly when you did that? A. I think so.

Q. You are using it today? A. Yes.

Q. I am referring to the alternate stripes, that you are using, red and white vertical?

A. That is right.

Q. In other words, you haven't changed the mark? A. Not a bit.

Q. What is the scope of your operations? Do you operate in all 48 states or——

A. No. I have a certificate or authority to operate in the State of California direct. I have the ability to operate in all 48 states through interline.

Q. What is interline? Is that an affiliate?

A. Joint carriage with other carriers that have the authority I lack.

Q. Is interline the name of a company?

A. Interline is the exchange of traffic between two carriers.

Q. And where do you maintain an office or offices?

A. I maintain several offices, and I maintain offices up and down the coast.

Q. Will you name the several cities where you maintain offices?

A. San Diego, Santa Ana, Los Angeles, Para-

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

mount, California, Monterey, Seaside, California, Oakland, Sacramento.

Q. Is that all? A. That covers it.

Q. And they are all in California?

A. That is right.

Q. Paso Robles?

A. Well, we did have an office there. We discontinued that.

Q. Now, these offices that you just mentioned in the various cities in California, do they all go under the name "National Transfer & Storage"?

A. They do. They go under the name of "Dean Van Lines and/or National Transfer & Storage."

Q. Do you have both names on each office?

A. Yes, sir, I have both names.

Q. What do you have on your trucks?

A. I have one or the other of them.

Q. You don't have them both on?

A. In some instances, yes.

Q. Do you display them with equal prominence then? A. Sometimes, yes.

Q. Do you have them in one line or one over the other, or what?

A. Well, we may have the name of "National Transfer & Storage" on the tractor and "Dean Van Lines" on the trailer, but I can't tell you what percentage one bears to the other.

Q. Do you use the shield trade-mark with the vertical stripes on all of the Dean Van & Storage?

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Mr. Von Herzen: Pardon me. What shield is this?

Mr. Groen: I mean the map.

Mr. Von Herzen: You don't mean the shield. You mean the map, don't you?

The Witness: I mean the map of the United States.

Q. By Mr. Groen: And you use that at all times? A. At all times, yes.

Q. That is the same way you use the "National Van & Storage" on the trucks?

A. "National Transfer & Storage."

Q. Or "Dean Transfer & Storage"?

A. "Dean Van Lines." I think you are confused there.

Q. It is all very confusing.

A. "Dean Van Lines and/or National Transfer & Storage."

Q. This letterhead I am showing you, is that, too, in use?

A. No. We are using a new letterhead bearing the name "Dean Van Lines."

Q. Through what channels do you advertise?

A. The telephone books, newspaper advertising, radio, television.

Q. Where is that carried on? Is it carried on outside of the State of California?

A. No, it is not.

Q. And you said in the telephone books, news-

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

paper, radio, television. Is that in any one concentrated area or in several?

A. Well, in several. It will vary. I mean in some we may have only the telephone or classified advertising that appears in the telephone book which is handed out to subscribers for the particular area we are operating.

Q. Where do you personally maintain your office? A. Here in Los Angeles.

Q. That is the home office from which you operate?

A. No, it is not. The home office is San Diego.

Q. But you personally stay in Los Angeles.

A. Yes.

Q. I am showing you a page from a telephone directory——

Mr. Turrentine: May I see it, counsel?

Mr. Groen: I was going to show it to him first, but that's all right. This is from the San Francisco directory.

Q. By Mr. Groen: This is from the San Francisco directory, and I refer you to page 485 under the caption of "Moving," and will ask you whether the quarter-page advertisement on the lower right-hand corner is that of your firm or your company.

A. Yes, sir, I think it is.

Q. And is it a typical way of your advertising.?

A. In this particular instance it happens to be, yes.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. And that appears in the current directories, does it? A. That is right.

Mr. Turrentine: Pardon me, counsel. You mean, I suppose, whether or not that is in the current directory?

Mr. Groen: Yes.

Mr. Turrentine: Wasn't it taken out of the directory?

Mr. Groen: I just took it out of a directory in my hotel room in San Francisco on Saturday, June 12th.

Mr. Turrentine: We will stipulate to it, of course, if it is.

Mr. Groen: I will ask the reporter to mark the page just identified by the witness as Plaintiff's Dean Exhibit A.

(The page referred to was marked Plaintiff's Dean Exhibit A, and is attached hereto and made a part hereof.)

[See page 493.]

Q. By Mr. Groen: Have you let your advertising for the classified directory in the San Francisco area or the San Francisco directory, for the coming directory? A. I have.

Q. Has there been any change in the ad from what this is? A. Yes, that is right.

Q. In what respect is that changed?

A. We will now use the name "Dean Van Lines."

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. Is there anything in there that says "National Transfer & Storage"?

A. Oh, yes, we always have that on this, in all of them.

Q. The same way?

A. Yes, the same way, "Also Known As."

Q. You are going to use both?

A. That is right.

Q. That is the way it will appear in the next directory? A. That is correct.

Q. Now, I am showing you the 1954 Business Directory and Maps, also entitled "Official Blue Book," for San Diego and surrounding territories, and call your attention particularly to page 136, and ask whether the advertisement appearing on that page, or the bottom portion of the page, "Dean Van Lines," is your advertisement.

A. May I take a look at it?

Q. Yes. A. Yes.

Q. Also the advertisement on the top of the page, on the right-hand side, is the "National Transfer & Storage," with the stripe design?

A. Yes.

Q. That is yours? A. Yes.

Q. That is their current directory for this present business, is it not? A. Yes.

Q. Is that the way you are advertising in the next telephone directory in the San Diego area?

A. No, it is not. We are merely making refer-

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

ence to the "National Transfer & Storage" in the fashion indicated, "Also Known As," like this, having a small six-point line down at the bottom part showing the name "National Transfer & Storage."

Q. Are you now using display ads in the classified?

A. I don't recall right now, but I am sure every one is about the same. The men run their own.

Q. Is that typical of the ads being run in the classified directories in the various cities in which you have offices now?

A. Yes, I would say it is.

Q. Their ads have the "Dean Van Lines" and "National Transfer & Storage," and in both instances the stripe design, with the alternate red and white stripes, or black and white as they appear there, of course.

A. We use the name "Dean Van Lines." If we elect to use the name "National Transfer & Storage," we would just as you see it there.

Q. What do you mean you would?

A. Our option.

Q. Wouldn't you say you are using both names all over? A. All over, yes.

Q. You use a design in your "National" ads in a like way? A Yes.

Mr. Groen: I will have the reporter mark this Plaintiff's Dean Exhibit B.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

(Page 136 of Official Blue Book, 1954 Business Directory and Maps for San Diego, was marked Plaintiff's Dean Exhibit B, and is attached hereto and made a part hereof.)

[See page 494.]

Q. By Mr. Groen: Referring to the current Los Angeles directory, what kind of display do you have in that for the classified section?

A. To my recollection we have got one of each, what the phone company classify as two-column ads similar to the one you have shown me in the San Francisco directory, with "Dean Van Lines" and a reference to "National Transfer & Storage."

Q. Does that have the stripe design in it?

A. Yes.

Q. What about the "National Transfer & Storage," do you have that, also?

A. I don't know. I have to check with my manager and see whether he runs under the "National Transfer & Storage, with the insignia or the trademark.

Q. When does the next directory come out here?

A. I think it is closed in August sometime, isn't it?

Q. I don't know.

A. I couldn't tell you. August, I think.

Q. How long did you work for the plaintiff in this case, National Van Lines, Inc., as their agent?

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

A. You mean Al Dean or do you mean the National Transfer & Storage Co.?

Q. You said you were in business in 1944.

A. I worked for the company. I worked for National Van Lines—how long was it, Frank? Thirteen years. Thirteen or fourteen years. I think I went with them in about 1938, wasn't it?

Mr. Turrentine: Let's not talk to anyone off the record.

Mr. Groen: I wish that to be on the record. The record will show it.

The Witness: I worked for National Van Lines for approximately 13 years, up to the time of the termination of the agreement in question here.

Mr. Groen: Let the record show that the witness referred to Frank, who is Frank L. McKee, president of the National Van Lines, who is here in the room.

Q. By Mr. Groen: You worked directly for them at one time as one of their employees, is that it?

A. No, I did not. I acted as agent for the company, not under their name. To bring you up to date on that I would have to go into a long history of my experience in the business.

Q. Well, go ahead.

A. I started in business in 1936 here in San Diego under the trade name of "Golden State Van & Storage Company." I continued that operation until 1941, at which time, with a chap by the name

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

of Harris, I formed a corporation known as "Coast Van Lines, Inc."

Then in 1944 I again became an individual doing business as "National Van & Storage Company" in San Diego.

Q. Is that the early part or the latter part of 1944, do you recall? A. October.

Q. Then what?

A. We are up to date now. Pardon me. During all that time, if my memory serves me correctly, I was affiliated with Mr. McKee's company.

Q. During all of what time? From 1944 on?

A. I don't recall whether it was 1938 when we first made an agency tie-up with them, or it was 1937. 1938 or '37, somewhere in there.

Q. The contract which is attached to the Complaint as Exhibit 3 between National Van & Storage Co. and National Van Lines is dated November 7, 1944. Now, you didn't have any contract with them on an agency basis prior to that, did you?

A. Not under this name, no, but I did have under Golden State Van & Storage Company and under Coast Van Lines, Inc.

Q. And you recall that under this contract, which is the contract of November 7, 1944, Exhibit 3, you were permitted to use the name and insignia like National Van Lines, Inc.?

Mr. Turrentine: I suggest you show the contract to Mr. Dean, if you are going to ask any questions about it.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Mr. Groen: I thought he was familiar with it.

Mr. Von Herzen: I am wondering what you are referring to, also, counsel.

Q. By Mr. Groen: I refer you to page 3 of the Agreement, the middle paragraph under "Advertising."

Mr. Von Herzen: Counsel, I will object to the witness answering that question, on the ground that the contract speaks for itself, and it is the entire agreement between the parties.

Mr. Groen: I want to refresh his recollection as to further questions. I know the contract speaks for itself, but he apparently doesn't recall.

Mr. Von Herzen: May I see what you showed him, counsel?

Mr. Groen: Now, will you read the question to the witness?

(The question was read.)

The Witness: The contract contains that agreement.

Q. By Mr. Groen: Well, answer my question.

A. That is it.

Mr. Turrentine: I submit that is an answer. The contract speaks for itself, counsel.

Q. By Mr. Groen: Did you use the name "National" in any way prior to your association with National Van Lines, Inc. as an agent?

A. It was a brand new operation. I mean, that is, the National Transfer & Storage was a brand new operation. I gave birth to it in October of 1944.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. But you said you were in business prior to that.

A. Under the two names that I mentioned to you before.

Q. What were those names? Pacific——

A. Golden State. I was in business as a corporation from 1941 up to the time I went into the individual business under the trade name of "Coast Van Lines, Inc."

Q. You were not using the "National"?

A. No. We acted as an agent for National.

Q. And you at no time used the name "National" as a part of your business or trade name except as an agent for National, with the further exception that you have not been serving as an agent since I think it was 1950?

A. Well, I did use the name "National." I had that registered. I had the name "National Van & Storage" registered.

Q. What period are you speaking of now?

A. I am speaking of the period I went in business. I went in business in October 1944.

Q. You were agent for National then?

A. No, I was not.

Q. You just told me that before that you were an agent.

Mr. Turrentine: That is argument.

The Witness: If I signed an agency on November 7th, isn't that correct, I couldn't have been an agent prior to that date.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Mr. Groen: But you told me you were acting as an agent prior to that date.

Mr. Turrentine: Just a moment, counsel. I am objecting to that as argumentative. He said he was in business prior to that as a member of the Coast Vane Lines, which was an agent for National.

The Witness: I was a member of the corporation. I had an interest in it.

Q. By Mr. Groen: I beg your pardon. I was referring to you as an individual.

A. No, I was an individual, then a corporation. This Golden State Van & Storage Company was first a partnership, then an individual, and then I went in a corporation, and then back to my own individual operation.

Q. It is true that you personally or as a member of a corporation did not use the name "National," except during such periods as you were operating as an agent for National Van Lines, Inc.?

A. Well, I used my own name between October or between the time I signed the agency agreement as National Van & Storage. That is a matter of record.

Q. And you were an agent during that time?

A. No.

Q. You say you were not?

A. I could not have been an agent. I mean we signed the agency agreement, didn't we, in November?

Q. But I thought, as I understood you——

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Mr. Von Herzen: Counsel, if you have any other agreement, why don't you produce it?

Mr. Groen: I don't have it here. I was trying to verify the dates there.

Mr. Von Herzen: You say you have no other agreement?

Mr. Groen: No, I don't.

The Witness: No, we operated prior to the time we made the agency agreement, we worked under the name of National Van & Storage.

Q. By Mr. Groen: And didn't you previously state that you operated as their agents also prior to 1944?

A. Well, that was a corporation. I didn't.

Q. Through that corporation?

A. That corporation was agent for them, yes.

Q. Were you with that corporation?

A. I was. I was a stockholder.

Q. Did you know that National Van Lines, Inc. was using the name, that particular name, all that time that you weer in this business, either alone as an individual or with the corporation, prior to 1944?

A. I knew that dozens of businesses used that name.

Q. Just answer my specific question. Did you know that National Van Lines, Inc. were operating under that name, "National Van Lines, Inc."?

A. Sure.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. Then in 1943 you were operating as a corporation or you were operating a corporation?

A. Well, I had some stock in Coast Van Lines. To the best of my recollection the corporation sold out on or about that time. I don't know the exact date.

Q. Were you the principal stockholder in it?

A. No, I was not the principal stockholder.

Q. Were you working for them?

A. I was the second largest stockholder.

Q. And you were occupied full time with that?

A. Yes.

Q. Referring again to Exhibit 3 of the Agreement that you saw just a moment ago, that is canceled now, is it not? A. Yes.

Q. And it was canceled as of February 20, 1950, was it, to your recollection?

A. To my recollection.

Q. And you have had no direct connection with National Van Lines, Inc., since that time, as agent or otherwise? A. I haven't.

Q. Since your agency with National Van Lines, Inc., was terminated early in 1950, do you recall whether your office received mail or calls, any of your offices received mail or calls, which were properly intended for National Van Lines, Inc.?

A. Not to my recollection.

Q. Would incidents like that be called to your attention by any of your employees?

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

A. Not necessarily, unless they had to do with operations or policy.

Q. Well, suppose a customer of National Van Lines, Inc. called to inquire about something, either to give an order or complain or check on something, and they called your office, would you know about that? A. Yes.

Q. You would?

A. Yes. I had occasion to come face to face with some of that in the Monterey area.

Q. What was the nature of that type of call?

A. Oh, the business of complaints.

Q. Complaints about National Van Lines?

A. About their service.

Q. What sort of complaints?

A. Oh, late delivery, improper performance.

Q. Those calls came to your office?

A. Yes.

Q. Do you remember one of them?

A. Yes, sir.

Q. Who was that?

A. Mr. Bolger, O. J. Bolger. I think he operates under the name of Consolidated Van & Storage Company as an agent.

Is that true, Frank?

Q. Let's not ask questions. I asked whether you received calls that were really intended for National Van Lines, Inc., and you said yes.

A. Yes.

Q. That case that you apparently were telling

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

me about apparently involved someone else than National Van Lines, Inc. Tell me the specific case where you received calls for National Van Lines, Inc.

A. I don't have that down in record form.

Q. Has Consolidated an agency for National Van Lines, Inc.? A. I don't know.

Q. From whom would you say you got calls?

A. Oh, from some man, I take it, up in the area; since we were both running goods to the military they would get the companies confused, particularly in that small area.

Q. Did that happen in any other areas?

A. No.

Q. Would you know of any instance where confusion of that nature occurred between National Storage Company and National Van Lines, Inc. in the San Francisco area? A. I don't recall one.

Q. Would incidents of that nature be reported to you by your employees?

A. Not necessarily.

Q. Is Mr. Green one of your employees up there? A. He is.

Q. Was he for past years?

A. Yes. He has been with me for some time.

Q. He never reported to you about incidents of confusion between the two names of the two companies? A. No.

Q. He didn't, and you never inquired about it?

A. No. I had no occasion to.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. Would you be surprised if he was involved in several of those instances where he received calls for National Van Lines, Inc., which were made to your office by a customer? You wouldn't be surprised by that?

Mr. Fihe: He is shaking his head in the negative.

Mr. Von Herzen: I thought it was in the positive. I don't know what the question means.

What do you mean, his state of mind?

The Witness: Well, if I may go off the record——

Mr. Von Herzen: No, no.

Q. By Mr. Groen: You would not dispute that it was possible that Mr. Green or other employees in your office in San Francisco received calls that were intended for National Van Lines, Inc.?

A. No.

Mr. Von Herzen: Just a moment. I object to the question and instruct the witness not to answer. It is immaterial, the way the question is being asked. He doesn't know any were received and there is no showing that any ever came to his knowledge, and no showing it ever came to Mr. Green's attention.

Mr. Groen: I ask him whether any had come to his knowledge. He said he didn't know. I asked whether he would say and said it is possible that they occurred, and I asked him then if he would be surprised that such calls had come in to his office. I asked the witness to answer that.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Mr. Von Herzen: I got the impression that he was saying that he didn't know.

The Witness: It has not been brought to my attention, so I don't know, counsel. That is all I can tell you.

Q. By Mr. Groen: You visit your San Francisco office frequently?

A. Oh, infrequently.

Q. You spoke of receiving such calls that you know of. In what office was that, Monterey?

A. Monterey.

Q. Do you know of such incidents, receiving a wrong call or calls intended for National Van Lines, occurring in any other office? A. No.

Q. You don't know of any?

A. I happened to be in Monterey personally, and that is why I can make the statement.

Q. You are in your Los Angeles office continuously, are you not? A. That is right.

Q. Did you in your Los Angeles office ever receive any calls intended for National Van Lines, Inc.? A. Never to my knowledge.

Q. What about mail? Do you receive any mail that is intended for them and addessed for them, which is probably improperly addressed?

A. Not to my knowledge have we had any such incidents.

Q. You said you adopted the insignia comprising alternate red and white stripes along with that name about 19——

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

A. 1950 or '51, to the best of my recollection. I would have to refer.

Q. Was it after the termination of the agency for the National Van Lines, Inc.?

A. I couldn't tell you that.

Q. Would your records show that?

A. I presume so.

Q. What was the reason for adopting the insignia comprising the vertical red and white stripes?

Mr. Von Herzen: Counsel, hasn't that all been gone into? It has been asked twice.

Mr. Groen: I asked him whether he had. I didn't ask him why. Will you instruct the witness not to answer?

Mr. Von Herzen: He has answered. Wait a minute.

Mr. Groen: Will you read the last question, Mr. Reporter?

(The question was read.)

Mr. Turrentine: You may answer.

The Witness: A means to identify our company and service.

Q. By Mr. Groen: Why did you particularly choose alternate red and white stripes in a vertical position?

A. Why? There was no particular reason. We wanted to——

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Mr. Von Herzen: You have answered the question.

Mr. Groen: Please let him go on.

Mr. Von Herzen: You don't want that statement of explanation, do you?

Mr. Groen: Yes, I do.

Mr. Von Herzen: That is what you don't want.

Mr. Groen: This is broad discovery, and there is practically no limit to this.

The Witness: Well, to give you the idea now, to take up your time to elaborate——

Q. By Mr. Groen: All right, let's have it.

A. I went to several of my employees to say that I wanted a good-looking insignia, and that a prize would be awarded to anyone that would devise an insignia that would be suitable, we thought was the best for the certain purpose. One of the boys down in San Diego down there dreamed it up. That is all, no particular reason.

Q. What was this man's name?

A. Greiner, John Greiner.

Q. Is he still in your employ?

A. Yes, he is.

Q. He submitted a design like this in sketch form? A. Yes.

Q. He submitted it to you? A. Yes.

Q. You approved it? A. Yes.

Q. I take it that is still in your files?

A. I think so.

Q. Did you ever see National Van Lines, Inc.'c

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

shield with the vertical red and white lines on it prior to the time that your employee, Mr. Greiner, submitted this design to you?

A. I have seen the design all over the country.

Q. No, did you see the shield with the vertical red and white stripes prior to the time that you——

A. Yes, I did. I knew them for about 13 years and I saw it.

Q. You saw it frequently, did you not?

A. Yes.

Q. Your employee Mr. Greiner saw it, too?

A. Yes.

Q. Did you consider putting the stripes in any other position?

A. Never entered my mind, never gave that any thought even.

Q. Did you give any consideration then with others as to whether you would adopt this design involving stripes of red and white in vertical position?

A. Never gave that any thought.

Q. Did you have any discussion with others other than Mr. Greiner?

A. I might have spoken to my general manager, yes. I might have discussed that with him.

Q. During that discussion did you consider whether you should adopt this or adopt something else?

A. We didn't dwell on that at all.

Q. What was the purpose of your discussion?

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

A. As to whether we should adopt the insignia and use it.

Q. Did you discuss with anybody that National Van Lines had similar insignia with red and white vertical stripes?

A. Never gave any thought to that.

Q. Mr. Greiner didn't say anything?

Mr. Turrentine: Mr. Groen, you want the witness to talk freely, but you are interrupting him now.

Mr. Groen: I don't think I interrupted him.

Mr. Reporter, will you read the answer?

(The answer was read.)

Mr. Turrentine: You see, the witness was continuing his answer and you interrupted him.

The Witness: You are speaking of Mr. Greiner of San Diego, I take it?

Mr. Von Herzen: There is no question before you right now that I know of.

Q. By Mr. Groen: About how many people in your organization participated in this contest to devise a suitable trade-mark design?

A. Not too many. We didn't have too many employees at the time.

Q. How many would you say beyond Mr. Greiner?

A. Oh, possibly eight or ten.

Q. Did they all submit ideas on that?

A. Yes.

Q. And everything was discarded but this?

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

A. That is right.

Q. Did you consider the others that were submitted?

A. We gave them all consideration, yes.

Q. And you did compare this design submitted by Mr. Greiner with the other designs submitted by the other employees? A. Sure.

Q. What were some of the other designs?

A. Oh, I don't recall offhand.

Q. Did any of the other ones have stripes on them?

A. It seems to me they did, yes.

Q. Vertical?

A. Could have been vertical.

Q. Were they red and white?

A. They could have been red and white.

Q. Then more than one employee submitted the same idea.

A. No, they didn't submit the same idea.

Q. You said they were vertical and they were red and white.

A. I didn't say anything. I said I thought. I don't recall any specifically.

Q. Then you don't know whether they were the same.

A. That is right. I don't know that.

Q. Your shipments go in interstate commerce, do they not, Mr. Dean? A. Yes.

Q. Your trucks cross state borders?

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

A. Well, no, our trucks don't cross any state borders.

Q. Your agents? A. No.

Q. You operate exclusively in California?

A. That is right.

Q. You never ship outside of the state?

A. Ship a lot outside of the state.

Q. How does it get out of your trucks?

A. Interline.

Q. Do you have trucks under lease to another line? A. I do.

Q. Do they stay within the state or do they go outside of the state?

A. They go all over. The other parties' operating authority.

Q. They are lettered as your trucks nationally?

A. They are lettered as a combination of companies rendering interline service.

Q. And they carry the name of "National" and the shields with the red and white stripe insignia?

A. They carry the name "Dean Van Lines" now.

Q. They do show the name of "National"?

A. They do.

Q. Do those that show "Dean" have the stripe insignia? A. Yes.

Q. I believe you said they used the name "Dean Van Lines" and "National Van & Storage" interchangeably, and sometimes you have two in the same combination, a truck and trailer?

A. That is right.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. Those are the type of trucks that you lease to others?

A. Well, they are the same type, yes. They are not in the same service, though.

Q. Do you lease any trucks to Howard Van Lines? A. I do.

Q. And they operate in coast-to-coast commerce?

A. They do.

Q. And those trucks that you have leased bear the name "Dean Van Lines" and the insignia?

A. They do.

Q. And they bear the name "National Transfer & Storage" and the insignia?

A. They might, some of them might.

Q. They very definitely bear that mark?

A. Yes, very decidedly.

Q. And in service from coast to coast?

A. That is right.

Q. And they very likely do today, only with the name "Dean"?

A. No, I don't think they do today.

Q. You don't know?

A. I don't know at this moment. I am pretty certain they don't.

Q. Mr. Dean, will you give us your sales for the period from February 20, 1950 through May 31, 1954, all sales and services rendered, your gross receipts, while you were operating as National Van Lines, Inc.——

Mr. Turrentine: No.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. By Mr. Groen: ——National Transfer & Storage Co., and for Dean Van Lines.

Mr. Turrentine: Counsel, you didn't ask for that. There are books and records showing that.

Mr. Groen: I will give him time. He can produce them or you can produce them in any periods that are suitable as corresponding to your company's books, you may keep them that way, but I do want a breakdown beginning with February 20, 1950 through May 31, 1954.

The Witness: I will give them to you for any period you want.

Mr. Groen: For all business done, your gross receipts for the period, business under those two names.

The Witness: No problem at all.

Mr. Groen: When can you furnish that?

Mr. Turrentine: We will have to have a matter of a couple of weeks for that, counsel.

Mr. Groen: I was wondering whether it could be submitted to the reporter and included in the deposition.

Mr. Von Herzen: Let me make this suggestion: We can see that perhaps the matter is going to require us to take Mr. McKee's deposition.

Mr. Groen: You are entitled to.

Mr. Von Herzen: Well, we know that. Thank you, however.

Mr. Groen: We will cooperate.

Mr. Von Herzen: We have to get the date set

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

for that, and perhaps the matter can be available at that time, or next month, perhaps.

Mr. Groen: Well, I would like to get it. This case is set for trial in October, is it?

Mr. Von Herzen: What is the date?

Mr. Turrentine: October 26, I believe. In regard to the information you want, counsel, the gross operating revenue for Dean Van Lines, you are referring only to the business received other than from Government contracts.

Mr. Groen: I want everything, everything operating under the name "Dean Van Lines" and the insignia and "National Transfer & Storage" with the insignia, from February 1950 on through May 31st.

Mr. Turrentine: October 26th at 10:00 a.m.

Mr. Groen: My point is I don't want anything to interfere with the trial, but we want to get to trial in this case and get it settled, and anything you do prior to that time, of course, we will cooperate with. I believe that will be all, but I would just like to look over my record a minute.

There is one more question on this phase.

Q. By Mr. Groen: Mr. Dean, at any time during your association with National Van Lines, Inc. as an agent, either you personally or the corporation for which you were working, did you obtain loans from National Van Lines, Inc.? Did they ever loan you money? A. No.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. Did you ever obtain any loans from Mr. McKee, Sr., personally?

A. Is that relevant to this?

Mr. Von Herzen: Is that a matter of concern here?

Mr. Turrentine: I don't believe it is a matter of concern. I will instruct the witness not to answer.

The Witness: I won't answer.

Q. By Mr. Groen: Now, Mr. Dean, I am showing you what purports to be one of a series of circular letters circulated on or about June 15, 1953, under the name "Dean Van Lines," and also says, "Also Known As National Transfer and Storage," and ask if you are familiar with that.

A. Yes.

Q. You recall that that letter was mailed out by your offices? A. It was.

Q. About how many would you say you would guess were sent out?

A. I don't know. I couldn't hazard a guess.

Q. Dozens or hundreds?

A. I couldn't hazard a guess.

Q. But you did put them out amongst people that you did business with?

A. But specifically I don't know who they are.

Q. When you prepared it, who did you prepare it for?

A. We prepared it for the people we intended to have it.

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

Q. Can you be a little more specific? Who did you intend to have that?

A. That is what I say, I don't know specifically.

Q. You say people. Were they people you do business with? A. More likely, yes.

Q. Would it go to anybody else? Would it go to the people that you were advertising with?

A. No, I don't think so.

Q. Would it go to the trade generally where you might get business?

A. I don't think that kind of publication would reach the trade.

Q. It could? A. Could not.

Mr. Von Herzen: May I see the statement, counsel?

Q. By Mr. Groen: That is your best thought as to who those were sent to?

A. I would think so, yes.

Q. Where did they go out from, what office?

A. San Diego more than likely.

Q. This was prepared under your supervision, you knew about it? A. Yes.

Q. And you authorized its preparation and mailing, and who actually composed this letter? Did you? A. No, I didn't.

Q. You approved it, however?

A. That is right.

Q. You saw it before it went out?

A. I did.

Q. And there is no doubt about it that it went

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

to the places, at least the places where you got business, where you were doing business in the moving and storage? A. More than likely.

Q. And that would have covered the entire country, would it? A. I don't think so.

Q. Well, don't you do a national business indirectly?

A. No, we don't. We don't attempt to publicize our company nationally.

Q. It really would cover the State of California, certainly, wouldn't it? A. I think it should.

Mr. Groen: I will ask the reporter to mark that letter just identified by the witness as Plaintiff's Dean Exhibit C.

(The circular letter referred to was marked Plaintiff's Dean Exhibit C, and is attached hereto and made a part hereof.)

Plaintiff Dean's Exhibit C

[Letterhead of Dean Van Lines]

June 15, 1953

Important Announcement

This Company is registered and permitted to operate both as Dean Van Lines and National Transfer & Storage Company.

Because so many companies both in the Transportation field and elsewhere, operate under trade names beginning with the word National, we have

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

experienced difficulties from time to time, due to confusion of similar names.

For practical reasons this Company will therefore conduct all future transactions under the name of Dean Van Lines, and we shall appreciate your changing your records accordingly. There will be no change in management or operating procedure, but merely a shift in emphasis from the name National Transfer & Storage Company to that of Dean Van Lines.

DEAN VAN LINES, Formerly
National Transfer & Storage Co.

Q. By Mr. Groen: I notice, Mr. Dean, this letter now marked Plaintiff's Dean Exhibit C is mimeographed, is it, or is it multigraphed? In other words, it is a mass production job, isn't it?

A. Yes.

Q. And not individually typed.

A. No; that is right.

Q. All of which would indicate that you prepared quite a number of those.

Mr. Turrentine: Just a moment. I think that is a conclusion of counsel, and I instruct the witness not to answer. I think it is immaterial, anyway.

Mr. Groen: Well, I think it is quite material.

Mr. Turrentine: It has been asked and answered. The question has been asked before in substantially the same form as you are asking it, counsel.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Mr. Groen: No, it has not. I would like to have him tell me about this letter.

Mr. Turrentine: He has told you he doesn't know to begin with, don't know how many went out.

Mr. Groen: I want to refresh his recollection and to have him tell me.

Mr. Turrentine: I still instruct the witness not to answer. If you wish to get an order of court you may.

Mr. Groen: That is all.

Mr. Turrentine: Do you have any questions, Mr. Von Herzen?

We have no further questions.

/s/ ALFRED EDWARD DEAN

Subscribed and sworn to before me this 9th day of December, 1954.

[Seal] /s/ OPAL M. BURROWS,
Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

I, E. L. Drummond, a Notary Public in and for said Los Angeles County, do hereby certify that the witness in the foregoing deposition named was by me duly sworn to testify the truth, the whole truth and nothing but the truth; that said deposi-

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

tion was taken at the time and place heretofore mentioned in the annexed Notice, to wit, at Room 725, 453 South Spring Street, in the City of Los Angeles, County of Los Angeles, State of California, on Monday, the 14th day of June, 1954; that said deposition was written down in shorthand by me and thereafter transcribed into typewriting, and I hereby certify that the foregoing 40 pages are a full, true and correct transcript of my said shorthand notes.

I further certify that by stipulation and agreement of counsel, the said deposition may be signed by the witness before any Notary Public.

I further certify that I am not attorney for or relative of either party, or clerk or stenographer of either party or of their respective counsel, or otherwise interested in the event of this suit.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office this 19th day of June, 1954.

[Seal] /s/ E. L. DRUMMOND,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Dec. 13, 1954.

DEFENDANT'S EXHIBIT E

[Title of District Court and Cause.]

DEPOSITION OF ABRAHAM MECHANIC taken on behalf of the defendant, pursuant to notice and stipulation under Rules 27 and 30 of the Federal Rules of Civil Procedure, before Edna W. Knueppel, Notary Public, at the offices of Ira Milton Jones, Esq., Suite 714, 110 East Wisconsin Avenue, Milwaukee, Wisconsin, on Wednesday, December 8, 1954, commencing at 11:30 o'clock a.m.

Appearances: On behalf of Plaintiff: Kenneth T. Snow, Esq., 180 North Michigan Ave., Chicago 1, Illinois. On behalf of Defendant: Howard B. Turrentine and C. P. Von Herzen & S. L. Laidig, 453 South Spring Street, Los Angeles 13, California; Mason & Graham, Collins Mason, William R. Graham, 811 West Seventh Street, Los Angeles 17, California; Ira Milton Jones, Esq., by James R. Custin, Esq., 110 East Wisconsin Avenue, Milwaukee, Wisconsin of Counsel. On behalf of Abraham Mechanic: Milton Padway, Esq., 536 West Wisconsin Avenue, Milwaukee, Wisconsin.

(Thereupon the following proceedings were had and testimony taken:)

ABRAHAM MECHANIC

called as a witness herein on behalf of the defendant, being first duly sworn, was examined and testified as follows:

(Deposition of Abraham Mechanic.)

Direct Examination

By Mr. Custin:

Q. Will you please state your full name, and occupation?

A. My full name is Abraham Mechanic; occupation, mover, being president of the moving concern.

Q. You are the president of what concern, please?

A. National Van Lines, a corporation.

Q. That is a corporation?

A. That's correct.

Q. All right. Do you know when National Van Lines was incorporated?

A. Well, offhand no. I think it must have been in '48.

Q. 1948? A. Uh-huh.

Q. That is the best of your recollection?

A. Well, the last time I have gone through the records of the entire corporation papers.

Q. All right. Before that it was a partnership?

A. It has been a partnership between my wife and myself.

Q. And when was it organized as a partnership?

A. Originally, we went in business in 1930.

Q. And under what name did you go into business? A. National Van Lines.

Q. I see. The corporation, then, is the successor to the partnership? A. That's right.

(Deposition of Abraham Mechanic.)

Q. And took over all the business of the partnership? A. That is correct.

Q. You have been doing business continuously under this National Van Lines name?

A. Right.

Q. Since?

A. Never shoved down. Since 1930 telephone was never shoved down.

Q. And never changed the name?

A. Never changed names.

Mr. Custin: I think that covers it.

Any cross-examination?

Mr. Snow: I want to state for the record that we object to all of this testimony as being irrelevant.

No cross.

Mr. Custin: It is stipulated that signature of the witness to the deposition will be waived?

Mr. Snow: I will accept that.

(Which were all the proceedings had and testimony taken in the above-entitled matter at said time.)

Notary Public's Certificate attached.

[Endorsed]: Filed Dec. 13, 1954.

DEFENDANT'S EXHIBIT OO

[Title of District Court and Cause.]

DEPOSITION OF F. L. McKEE

called as a witness on behalf of the defendant, taken on Thursday, July 22, 1954, commencing at 10:00 o'clock, a.m., at Suite 725 Citizens National Bank Building, 453 South Spring Street, Los Angeles, California, before Ross Reynolds, a notary public in and for the County of Los Angeles, State of California.

Appearances: For the Plaintiff: Albert J. Fihe, Esq., 1023 Victory Place, Burbank, California. For the Defendant: C. P. Von Herzen, Esq., 453 South Spring Street, Los Angeles 13, California.

F. L. McKEE

a witness called by the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Von Herzen:

Q. Will you state your name for the record, Mr. McKee? A. F. L. McKee.

Q. And where do you reside?

A. At 12549 Addison, North Hollywood.

Q. And where is your business, Mr. McKee?

A. At 2431 Irving Park Road, Chicago, Illinois.

Q. What is the name of the concern?

A. National Van Lines, Inc.

Q. And that is incorporated, is it?

A. Yes, sir.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. You allege in your complaint that it is a corporation organized under the laws of the State of Illinois. A. Right.

Q. That is correct, is it? A. Right.

Q. Do you have some documents with you to indicate the Articles of Incorporation?

A. Yes, sir.

Q. May I see them, please? A. Yes.

Q. Mr. McKee, you have handed me two documents, one of which appears to be a certified copy of Articles of Incorporation of National Van Lines, Inc., the certification bearing date the 20th day of March, 1941, referring to an incorporation of National Van Lines, Inc., and enclosing a photostatic copy of Articles of Incorporation which appear to be dated June 21, 1934, the articles reciting that F. J. McKee, D. W. Johnson, and Watie Johnson, are the incorporators of the concern whose name is National Van Lines, Inc., incorporated under the laws of the State of Illinois to conduct a general furniture-moving and shipping business.

Mr. Von Herzen: May I ask you, Mr. Fihe, instead of attaching this or marking it, will you be willing to let me keep this for a few days so that I can see Mr. Turrentine and show it to him? I am making this suggestion to avoid encumbering the deposition with a lot of these records, and I will return this to you.

Mr. Fihe: Yes; that will be satisfactory.

Mr. Von Herzen: Q. I will describe the next

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

document. You have also handed me a second document, appearing to be a certified copy of an amendment to the Articles of Incorporation of National Van Lines, Inc., the certificate of the Secretary of State of the State of Illinois being dated May 22, 1948, and embracing photostatic copies of amendment to Articles of Incorporation filed May 22, 1948 of the National Van Lines, Inc., appearing to pertain to the shares of stock of the concern.

Mr. McKee, some reference has been made in the complaint to the fact that National Van Lines, Inc. is the successor of a business that existed prior to the time of its incorporation in 1934. What can you tell us about the predecessor of the plaintiff corporation here? Where did it do business first?

A. It was started in Chicago.

Q. By whom?

A. In 1929, by F. J. McKee.

Q. F. J. McKee is who with relation to yourself?

A. My father.

Q. And was that business incorporated?

A. I am not sure. At the moment, I am not sure.

Q. Where did that business have its principal office? A. In Chicago.

Q. Was it the same address as this concern on the Irving Park Road?

A. No; it was on North Clark Street.

Q. And how did it start its business? Did it have a truck?

A. Yes; a couple of trucks.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. How long did that obtain? I mean how long did the business continue with a couple of trucks?

A. I would say about two years.

Q. In 1934, when this present plaintiff corporation was organized, how many trucks did it have then? Do you know? To place it in your mind, it was the year after the bank closure in 1933.

A. I wasn't there at the time. I would say about a half a dozen company trucks and then some leased equipment.

Q. Where were you at the time?

A. I was on the West Coast, out here.

Q. And what were you doing?

A. It was the time we had an office at Santa Monica and La Brea in Los Angeles and I was running that office here.

Q. Where you transporting goods between Los Angeles and Chicago?

A. Yes. There were two trucks on a regular run at that time.

Q. This was in 1934?

A. Yes; 1932, 1933, and 1934. There may have been a third truck or a third and fourth truck under lease, if my memory serves me right.

Q. From someone else? A. Yes.

Q. And who did you lease the truck from? Do you remember?

A. It was a fellow by the name of Maury Scott, and there was a fellow by the name of Sweeny, but

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

I don't know whether he made the run out here. I am not sure of the fourth party's name.

Q. You were in charge of the office there at Santa Monica and La Brea, is that right?

A. That is right.

Q. Did you go to New Orleans back in 1934?

A. I did not go to New Orleans. Where does that come in?

Q. I was just wondering about that. You did not go to New Orleans?

A. No. I don't know what you are talking about at the moment.

Q. Where did you go in 1934? Was it a regular run between Los Angeles and Chicago?

A. Do you mean where the trucks went?

Q. Yes.

A. The trucks were going whever they got loads.

Q. Wherever you could get business, is that right?

A. Yes. Our certificate was non-radial. We could go to and from 39 States and the District of Columbia at that time, including some Western States, California, New Mexico, and Arizona.

Q. Referring to the regular run you mentioned that the two trucks made, what was the regular run, between what termini?

A. Very largely there was a preponderance of West Coast business at that time. That is why I say they were on a regular run. There was a great deal of traffic coming to the Coast.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. From where?

A. From eastern parts.

Q. Was the regular run predominently between Chicago and Los Angeles?

A. Well, more than between eastern points and San Francisco or San Diego but to points in California. It could be said that there was more business in connection with Los Angeles than other cities of the State.

Q. Then, you maintained terminals in Chicago on the one hand and in Los Angeles on the other, is that right?

A. We also had a New York terminal.

Q. In 1934? A. In 1934.

Q. Where was that, Mr. McKee?

A. At 1775 Broadway.

Q. How long did you maintain that?

A. We are still maintaining it.

Q. At that same address? A. Yes, sir.

Q. When did it start?

A. I am not sure whether it was opened up before the L. A. office but it was around that time if I remember correctly. I would have to look up records to be sure, as it is a little while ago.

Q. Of these different terminals, you had three in about 1934, I take it, one in New York that you mentioned, one in Chicago that you mentioned, and one in Los Angeles, is that correct?

A. That is right.

Q. Did you have any others?

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

A. No; not at that time.

Q. What terminals do you maintain now?

A. In addition, Washington and Dallas.

Q. Those three first mentioned and Washington and Dallas in addition?

A. That is right.

Q. You have five terminals now altogether?

A. That is right.

Q. Has all the shipping business that you do, the furniture-shipping business, been done under the plaintiff corporation here known as National Van Lines, Inc.?

A. Do you mean was it done by that company alone?

Q. No. I am now asking you whether the shipping business that is tendered to you is handled under or by the plaintiff corporation, National Van Lines, Inc.

A. Would we want to do it any other way?

Q. I don't know. Do you?

A. If the business is handled by the employees of National Van Lines, we do it. Nobody else does it for us.

Q. Do you and your father have any other concern besides National Van Lines, Inc. for furniture moving? A. No; we don't.

Q. You do not? A. No.

Q. Do you do business under any other name?

A. No.

Q. You do not? A. No.

Defendant's Exhibit CO (Continued)
(Deposition of F. L. McKee.)

Q. All business, therefore, I take it, that is tendered you by shippers, is done by this concern, the plaintiff corporation, National Van Lines, Inc., is that right?

A. That is right. We had a concern or a line called National Transfer, but it is not doing any business today.

Q. National Transfer? A. Yes.

Q. When you say "we had", who was that?

A. Dad and myself.

Q. Just the two of you? A. Yes.

Q. Was that separate from National Van Lines, Inc.? A. That is right.

Q. How long did you operate under the name National Transfer?

A. About two or three years, I would say.

Q. When?

A. Within the last two or three years.

Q. Since 1950? A. Yes.

Q. Was that a corporation or was it a partnership or what?

A. It was a corporation.

Q. And where was that corporation incorporated? A. In Illinois.

Q. Where did it function? Did it function in California?

A. It was a local operation in Chicago.

Q. A local operation in Chicago?

A. That is right.

Q. It didn't function in California at all?

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

A. No.

Q. Did it do any interstate shipping business?

A. No; it was just a local transfer setup.

Q. What was its complete name?

A. National Transfer Company.

Q. Did it have the word "Company" on it?

A. Company; yes.

Q. You say that has been abandoned?

A. Yes; I think that would be the term.

Q. When did the National Transfer Company as an entity cease doing business?

A. About a year ago.

Q. Do you happen to have the corporate papers of the National Transfer Company?

A. No, sir.

Q. That was incorporated in the State of Illinois, you stated? A. Yes, sir.

Q. Do you know whether or not the corporation has been dissolved or is it still in existence?

A. It is still in existence.

Q. When this corporation, National Van Lines, Inc., was formed, what did you do, Mr. McKee, with the business that was conducted by your father prior to that time?

A. I don't think I understand your question.

Q. When this corporation was formed, what did you do with the business that was conducted by your father before the corporation was formed?

A. All the property of the former company

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

came to National Van Lines and it was National Van Lines from that point on.

Q. And what was the name under which your father operated before National Van Lines?

A. National Shippers and Movers.

Q. Was that your father alone or was it you and your father together?

A. It was my father alone.

Q. Alone? A. Yes.

Q. Was there some sort of a certificate or something of that sort, issued by the State of Illinois, indicating the nature of the business, its ownership and so forth?

A. I don't know much about the National Shippers and Movers.

Q. Did the firm National Shippers and Movers continue either as a name or in any other capacity following the organization of National Van Lines, Inc.? A. No.

Q. It abandoned all of its name at that time, did it?

Mr. Fihe: That is objected to as leading and suggestive and putting an answer in the witness' mouth. You may answer if you can, Mr. McKee, as to whether or not anything was abandoned.

Mr. Von Herzen: I will reframe the question, Mr. Fihe.

Q. The name "National Shippers and Movers" was not used after the incorporation of National Van Lines, Inc., was it?

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

A. Not to my knowledge. The conversion was made as readily as possible.

Q. Is it being used today?

A. No, sir.

Q. Do you know whether that name is actually in use by anyone?

A. No, sir; it isn't.

Q. Going to the time of the incorporation of this concern, do you have some records to indicate the transfer of the assets of National Shippers and Movers to National Van Lines, Inc.?

A. No; I have no records on National Shippers and Movers.

Q. Are there some records of National Van Lines to indicate their taking over the assets of National Shippers and Movers? Do you have any such records?

A. I have no such records here. I don't know whether there are such records that would clearly show it or not. That was twenty years ago.

Q. Aren't there some documents in existence, Mr. McKee, to indicate the transfer of title or transfer of ownership from one concern to the other?

A. There must be, but I wouldn't know where to put my hands on them.

Q. Mr. McKee, if I were to suggest to you that the name "National Shippers and Movers" was continued by your father for several years after incorporating National Van Lines and doing busi-

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

ness under that name, would you say that that was wrong?

A. I wouldn't have any knowledge of it. I would have to see proof of it to consider it.

Q. Where does your father reside?

A. Here in California.

Q. And what is his address?

A. I think 4042 Radford, North Hollywood.

Q. Pretty close to where you live?

A. Yes.

Q. Is he in good health? A. Fair.

Q. Would he be available as a witness?

A. He is 76 years old. I wouldn't want him to be bothered with it, really.

Q. We don't want to create any hardship in the matter at all.

A. He has a heart condition and has high blood pressure and a kidney problem.

Q. That is why I asked you about his health.

A. He is up walking around now, but he doesn't get out much.

Q. Who else in the business would know these facts besides your father? Is there someone else that would know them?

A. If they were very important, I could probably get something from the secretary of the company. What need is there for that information twenty years ago, may I ask?

Q. You will have to leave that to my judgment. Who is the secretary?

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

A. E. C. Johnson.

Q. And is he in Chicago? A. Yes.

Q. Is he any relation to D. W. Johnson?

A. No.

Q. May he be located at your Chicago office?

A. Yes.

Q. Is he there all the time?

A. It is a woman, not a man. She can be located there, yes, at any time.

Q. How long has she been with the concern?

A. Since its incorporation.

Q. In 1934? A. Yes.

Q. Is your father an officer of the company?

A. No.

Q. Is he a director? A. Yes.

Q. In 1934, at or about the time that you incorporated this concern, you submitted tariffs, did you, for the hauling of household goods between various places in the United States, is that right?

A. No. In 1934, there wasn't even Part 2 of the Motor Carrier Act. There was no requirement for the filing of tariffs.

Q. What did you mean when you said you had a certificate in 1934 in 39 States?

A. We didn't have it in 1934. We didn't get that certificate until 1942.

Q. In other words, in 1934, when this business was conducted, there was no certificate whatever, isn't that true?

A. That's right. You got it anywhere.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. And you did business, is that right?

A. That is right.

Q. Without a certificate?

A. That is right.

Q. And you would take an occasional load perhaps in some city that you might go to just once in ten years, isn't that correct?

A. No, sir. We received our certificate for 39 States and the District of Columbia as a result of having gone to points in those 39 States and the District of Columbia prior to June 1, 1935. So it couldn't have been once in ten years because we only had a couple of years in which to do it and to get that authority.

Q. You submitted, then, your original proof of having been to a certain city in 1935 to the Interstate Commerce Commission, is that right?

A. Right.

Q. And when did you get your certificate?

A. In 1942. I have forgotten the exact date.

Q. Do you have that document with you?

A. No, sir. You didn't ask for it.

Q. I thought I did. Do you have your tariff?

A. Yes, sir.

Q. Will you let me see that, please?

A. Yes, sir.

Q. You have handed me three documents, the first one being a tariff issued by the National Tariff Bureau, under date of April 1, 1941, to be effective May 1, 1949, through one Louis Hobmann of

Defendant's Exhibit OO (Continued)
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261 Constitution Avenue, Northwest, Washington 1, D.C., the next one being a National Tariff Bureau tariff for the account of National Van Lines, Inc., under date of October 1, 1950, to be effective November 13, 1950, through the same individual, and the third one being a National Tariff Bureau tariff for the account of the persons named on page 3, issued August 25, 1953, to be effective October 1, 1953, through the same individual. I notice on page 3, Mr. McKee, that this tariff is issued for points or between points and places in the United States other than those in Idaho, Montana, Nevada, North Dakota, Oregon, Utah, Vermont, Washington, and Wyoming. Are those the States in which you hold no certificate?

A. At that time, we didn't.

Q. Do you have a certificate in those States now?

A. We have a certificate for the whole 48 States now.

Q. But at the time of the 1949 tariff issuance you did not have it for those States, is that correct? A. That is correct.

Q. Do I understand, then, Mr. McKee, that, in 1949, you had a certificate for all of the States except the ones that have been just named?

A. Yes, sir.

Q. Did the Interstate Commerce Commission place any restrictions upon your moving of household goods between any points in these 39 States?

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

A. No restrictions.

Q. Mr. McKee, I notice here in Rule 36, and I just happened to glance at it at random, there is a restriction which reads as follows:

"Rates published in the tariff as amended for account of carriers named in paragraph B of this Rule will apply only on joint movements and only on shipments in connection with which National Van Lines, Inc., Chicago, Illinois, is the originating carrier and the carriers named in paragraph B of this Rule, the delivering carrier."

Did you have certain restrictions in your tariff by which you provided that under certain circumstances the public could only look to you for carrying goods if you were the originating carrier under the rates shown? Would you like to look at this?

A. Yes. I don't recall what that Rule was.

Q. I am looking at page 5, Rule 36, (ADD). I just happened to glance at it.

A. This Rule is made up by National itself and not a rule of the Commission because we file this tariff with the Commission, and we are merely explaining that we will be the originating carrier on movements that would interline with Ford Van Lines or Mollerup, moving in storage, for movements beyond our authority. This was before we had an addition to our certificate.

Q. When did you get that addition to your cer-

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

tificate? I think I asked you that, but I can't now recall.

A. I think, if I am correct about the date, we received the certificate on or about May 2, 1952 or May 1st, around there.

Q. Would your certificates from the Interstate Commerce Commission that you obtained in 1942, and amendments, enlargements, and modifications, be in Chicago or would they be here?

A. They are hanging on the wall in the Chicago office.

Q. Those are probably certified copies, are they not?

A. Those are the originals that the Commission issued to the company.

Q. You don't have them here anyhow, do you?

A. No, sir. As I say, you didn't ask for them.

Q. I think perhaps I used the word "tariff" when I had in mind the certificates as well and I didn't use the word "certificates".

A. The date of the second certificate might be 1950. I don't think that it was ten years after the other certificate. I think it might have been 1950, but I am not sure.

Q. Mr. McKee, does your firm hold an intrastate certificate from the State of California for the carriage of household goods? A. Yes, sir.

Q. And what area does that embrace? Let me ask you first, do you hold it as a common carrier in the State of California? A. Yes.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. Do you have certain routes and termini in that connection?

A. Not for household goods. We have the same certificate that all other established movers have for the State of California.

Q. You have to designate routes for that purpose, do you not?

A. No. I think the certificates state from a point to all points and back to the originating point.

Q. That would be a radial certificate, is that right? A. Yes.

Q. Do you hold such a certificate? Do you have a radial certificate?

A. Yes; if I am not mistaken, we hold an intra-certificate and I believe it is a radial.

Q. And from what point does it radiate?

A. It would be Los Angeles.

Q. Do you have offices elsewhere, than in Los Angeles, in California?

A. No; not at present.

Q. Did you at one time? A. Yes.

Q. Where?

A. We had an office in San Francisco.

Q. How long?

A. Up till a year ago last May.

Q. And how long did you have that office in San Francisco, from that date?

A. I don't remember from what date, but we had it perhaps ten years.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. Do you know what occasioned the closure of that office?

A. I was having trouble with the personnel in the office and I had no one else to put in. I had no replacements at the time.

Q. Was that this gentleman whose deposition was taken? A. That is right.

Q. What is his name, again?

A. Bob Adams.

Q. Are the California certificates located here, Mr. McKee?

A. I believe so. I haven't seen it myself.

Q. Who would have them?

A. The office manager.

Q. Your office manager here in California?

A. Right.

Q. At what address?

A. 1855 Glendale Boulevard.

Q. And what is that office manager's name?

A. Walter Bock.

Q. I notice, Mr. McKee, in the tariff which you handed me, which is the most recent one, effective October 1, 1953, there is a restriction apparently written in the tariff which reads as follows:

"National Van Lines, Inc., between all points and places in the United States except (a) between points in California on the one hand and, on the other, points in Oregon and Washington; (b) between points in Oregon and Washington."

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Is that one of the restrictions that was placed on your certificate?

A. That is right. That was a restriction in the 48-State certificate.

Q. I thought you mentioned to me there were no restrictions in your certificate or is that something that was just overlooked?

A. I don't know how you put the question, but that restriction has always been there.

Q. That is the way it was issued originally?

A. That is right.

Q. And it still obtains?

A. That is right.

Q. So that National Van Lines, Inc. could not, for example, pick up a person's goods in Los Angeles and deliver them to Portland, Oregon, is that right? A. That is right; we could not.

Q. Nor could they pick up goods of a person in San Francisco, for example, and deliver them to Seattle, Washington?

A. That is right.

Q. Nor could you pick up goods in, say, Eugene, Oregon, and deliver them to Tacoma, Washington, could you? A. No, sir; we couldn't.

Q. And that particular business you reject, is that correct? A. Yes; we don't get it.

Q. Do you haul anything other than household goods and I am referring to the National Van Lines, Inc.? A. Yes; new furniture.

Q. When you refer to new furniture, you refer

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

to furniture from a jobber or from a manufacturer, destined for an outlet of some sort?

A. Yes; from a manufacturer to a jobber.

Q. Roughly speaking, about what percentage of your business constitutes new-furniture moving as distinguished from household-goods moving?

A. A very small percentage. I don't know what the figure is.

Q. Roughly, is it less than ten per cent?

A. Yes.

Q. Less than five per cent, do you think?

A. Yes.

Q. So that 90 per cent of your business or more consists of the movement of second-hand household goods either the property of the individual person using the household goods in connection with their home or something of that sort?

Mr. Fihe: I object to the use of the word "second-hand." It intimates something which may be sold by a dealer in used furniture.

Mr. Von Herzen: I have no objection to reframing the question.

A. If you say household goods, that covers it because new furniture is not household goods.

Q. Then, 90 per cent of your business is the moving of household goods, as distinguished from new furniture?

A. That is right, of national account business and Government and C.O.D.

Q. You have mentioned three categories of ship-

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

ments of goods, household goods, national account, Government and C.O.D. Can you explain that for me, please?

A. National account business consists of the movement of household goods of employees being transferred by a commercial house like Sears-Roebuck or Western Electric, and so forth. Government business is the movement of household goods of personnel of the Armed Forces. C.O.D. is the movement of the general public, the household goods of the general public, which is a collect-on-delivery.

Q. An individual householder, in other words?

A. That is right.

Q. Now, as to the first category, the national account business, that is a matter of contract, is it, with the employer like, for example, Sears-Roebuck, is that correct?

A. It is the solicitation of business with a traffic manager of that firm.

Q. Let's take Sears-Roebuck as an example. Your concern is with the solicitation of the traffic manager of Sears-Roebuck? A. Yes.

Q. And that traffic manager may have in charge the necessity of moving some employee from Chicago to Los Angeles, is that right?

A. Yes.

Q. And you solicit that traffic manager for that particular business? A. Yes.

Q. And, if you were successful, you would have a contract or some order of some sort to move that

Defendant's Exhibit OO (Continued)
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particular employee's household goods from Chicago to Los Angeles, is that right?

A. Yes, sir.

Q. You do considerable of that type of movement of household goods, do you not?

A. We do all we can get.

Q. Let's take Sears-Roebuck as an example. Where does that business originate? Do you solicit that in Chicago or in Los Angeles or at what points?

A. I think that the work of Sears-Roebuck comes out of the Chicago office.

Q. And that is where the solicitation and the arrangement is made, is that correct?

A. Of that particular account; yes.

Q. As to various national concerns, then, you do business with the traffic managers wherever the traffic manager is located, is that correct?

A. Some of the accounts have the work of that locale handled by the traffic department in that locale rather than the main office, in other words, the work from that particular locale.

Q. Do you have any such businesses that give you a contract to move all of their personnel as necessary and as called upon from time to time?

A. No.

Q. You do not? A. No.

Q. Then, each individual move is a separate contractual relationship with the national concern for whom you move the employee, is that right?

Defendant's Exhibit OO (Continued)
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A. Yes; that is the character of the work as given out.

Q. Can you give us any estimate of the amount of your total business that is done on that national account, only just roughly?

A. No; I can't.

Q. Is it as much as half of your business?

A. No.

Q. Probably less than a third, is that right?

A. I would say yes; that is right.

Q. Let's move to the Government end of the business, Mr. McKee. You mentioned that that was the movement of the individuals that went in the Armed Forces of the United States?

A. Yes, sir.

Q. How is that business handled? Is it by contract, is it by bid or just how does it come to you?

A. That is handled by solicitation.

Q. In what way, Mr. McKee?

A. By contact with the traffic officer of the Base.

Q. Is it by negotiation or is it by bid or do you know?

A. It is by bid in some instances and in others the work is given at tariff. You don't have to bid for it. They give it to you on your tariff.

Q. If it is between points that are named specifically in your tariff, you don't have to bid for it, isn't that right?

A. It depends upon the Base. Some Bases re-

Defendant's Exhibit OO (Continued)
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quire a bid and others give the work out to whomever they want, at the tariff.

Q. Let's take the Base at Monterey, for example. Do you know how that is handled?

A. The work at Monterey is given out on a Section 22 bid. I believe it is on the rate level of No. 8 tariff.

Q. And, as personnel is to be moved, the carriers are invited to make a bid, isn't that true?

A. No.

Q. You said this was being done up at Monterey——

A. This bid is placed with the transportation office and it remains there for any work that develops in the interim.

Q. And how often do you make that Form 22 bid? It is every year or every six months or how often?

A. You wouldn't change that bid unless competition upset the apple cart and you had to change the bid to compete.

Q. Are there instances where you use other than tariff rates in making a Form 22 bid?

A. Yes, there have been instances.

Q. Is that true, for example, of Monterey?

A. I don't know whether that would pertain to Monterey or not.

Q. Well, what places do you have in mind in that connection?

Defendant's Exhibit OO (Continued)
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A. Certain Bases might look for a bid other than at some rate level on a mass movement.

Q. Do you have any particular one in mind where that has been done?

A. No; I don't have any particular one in mind.

Q. Name one instance where that has been done?

A. Down in San Diego a few years back, there was a great deal of work going out of there at one time and the carriers were changing their bids. I don't recall any particular instance other than that one that comes to mind.

Q. The one in San Diego was the result of one particular carrier putting in a very low bid, wasn't it? May I suggest to you that was the Ace Van & Storage Company?

A. I don't know who it was, but, as I say, someone has to upset the apple cart and then everyone has to change the bid in order to be competitive, but there was a bad situation in San Diego.

Q. This Government business, up until a few years ago, was a matter of price, was it not?

A. Yes. I think the situation on the Government work has improved of late.

Q. That is in the last three or four years, isn't that true?

A. Yes; I would say in the last year.

Q. About the last year? A. Yes.

Q. Before that it was a question of the traffic officer getting the best possible price for the person whose goods were to be moved, isn't that true?

Defendant's Exhibit OO (Continued)
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A. That was pretty much the case.

Q. Could you give me some percentage of what share of the household goods moving business, that the National Van Lines does, is Government business of the type we have been talking about?

A. I think it would be somewhere around 35 per cent.

Q. A little over a third, practically?

A. Yes. The national account is much less than a third. Of course, the bulk of the business is C.O.D.

Q. Would the national account amount to as much as 20 per cent?

A. The C.O.D. would run about 60 per cent, I think.

Q. And the Armed Forces perhaps 35 per cent?

A. Yes, and the national account somewhere between 5 and 8 or 10 or somewhere around there.

Q. In the third category you mentioned, the C.O.D., the individual householder, that solicitation is of the individual through means of advertising, telephone directories, and so forth, isn't that correct? A. Yes.

Q. You also maintain individual solicitors in the urban centers, do you?

A. We maintain salesmen at each of the offices, and my problem up in San Francisco was a salesmen problem. I mean they just were not getting the business.

Mr. Von Herzen: Mr. Fihe, as to these various documents, may we hold these for a few days, as

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

we did with the Articles of Incorporation, and return them to you?

Mr. Fihe: Yes; that will be satisfactory. I might suggest, however, that you return them directly to Mr. McKee.

Mr. Von Herzen: I will do whatever you say.

The Witness: They are Chicago records.

Q. Do you want these returned to Chicago? Supposing I drop them off at your office on Glendale Boulevard.

A. They will see that they get to Chicago.

Q. Now, do you have the reports or copies of the reports that are published by the Public Utilities Commission of the State of California?

A. Which report is that?

Q. That is the annual report of a certificated carrier in California.

A. Yes; I think I have that. I think 1946 is missing from that group.

Q. No; 1946 is here. You have handed me a series of documents bearing the dates 1945 to 1953, inclusive, being the bank and corporation franchise tax returns of National Van Lines, Inc.

In order to identify them, Mr. McKee, I will step over here and just take one figure at random. The 1945 return shows the first item as gross receipts, $503,737.26; 1946 shows gross receipts of $638,498.77; 1947 shows gross receipts of $1,461,-844.76; 1948 shows $2,270,880.69; 1949 shows $2,-513,052.58; 1950 shows $2,454,341.69; 1951 shows

Defendant's Exhibit OO (Continued)
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$2,166,833.93; 1952 shows $2,655,802.84; 1953 shows $3,096,521.35. Mr. McKee, are those gross figures shown on those bank and corporation franchise tax returns the figures of the total business of National Van Lines throughout the United States?

A. Yes, sir.

Q. Mr. McKee, these figures would seem to indicate that your business has grown every year.

A. No. One year there you will see quite a drop; in 1949, I think it was.

Q. 1949 and 1950? A. And 1950.

Q. I take it no part of that drop is ascribable to any activities of the defendant in this instant proceeding? It has nothing to do with Mr. Dean or his business, has it?

A. If his business showed a big increase in those years, it might have had a considerable effect. We have no way of knowing how much business is diverted to him. We get an idea from the business that is misdirected to us in the confusion, people that are trying to get hold of him that contacts us, and we feel that the reverse would be true to a much greater extent because of our greater volume to start with.

Q. In the last three years since 1950, the 1951 return shows $2,166,000; the 1952 return shows $2,655,000; and the 1953 return shows $3,096,000, eliminating the hundreds and the cents. All of those returns indicate an increase in business of, roughly, about $400,000 per year?

Defendant's Exhibit OO (Continued)
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A. The increase is affected greatly by our putting on more agents in various locales.

Q. You don't claim, do you, that there has been any actual decrease or loss in your business by virtue of Mr. Dean's activities in the years 1953 and 1952, do you?

A. In spite of the increase, we have lost business to him according to the records, according to the deposition of Bob Adams, the office manager at San Francisco, and other records. You might say we are doing that increase in spite of what effect he has on our business.

Q. In other words, there are no losses that can actually be claimed or established by reason of any of Mr. Dean's activities, is that right?

A. As I said before, we don't know how much business he gets of ours because he doesn't tell us. We do know that some of his inquiries come to us and can figure that our inquiries must be going to him to a much greater extent because of the difference in sizes of the two businesses. I mean the confusion is there. We only witness a portion of it, that which comes to us that should have gone to him in the first place. For instance, two weeks ago, we got a crating contract from the Base that was intended for him, but they sent it to us.

Q. The Base where?

A. We don't know how much business he gets of ours because he doesn't tell us. This is Fort MacArthur. And, on June 18, 1954, we returned the

Defendant's Exhibit OO (Continued)
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crating contract to them and told them, "Returned herewith is a crating bid contract addressed to the National Transfer & Storage, 124 North Center Street, Los Angeles. As you will note, 124 North Center Street was our previous location prior to our removal to our present address in 1953. No doubt this bid was meant for National Transfer & Storage Company, as National Van Lines, Inc. has never applied for any crating contract."

Q. You don't do any crating?

A. No, sir. They were trying to give us his business, misdirecting it to us.

Q. You have a group of those, I take it, is that right, a group of misdirections, the first one of which you read there? Are there some others?

A. That is the only one I have with me. That is very recent. But Bob Adams testified to many complicating cases.

Q. Are there other records besides what Bob Adams testified to? Are there some other records available that would indicate that?

A. Yes. It would be a matter of digging for them and locating the cases. They are in the files.

Q. What would be the records? What form would they take?

A. It would be notations of inquiries that were made wrongfully. It would be more of what Bob Adams was testifying to, bills that were sent to us, claims that came to us, business that had to be redirected.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. Who would have those records?

A. They are in the files. It is a question of digging them out.

Q. The files where?

A. Of National Van Lines.

Q. Where? At what place?

A. It would be in the San Francisco files and in the Los Angeles files.

Q. The San Francisco office is no longer there, is it?

A. No; the files were taken back to Chicago.

Q. The files actually, then, are in Chicago now, is that right?

A. Yes; the San Francisco files were transferred to Chicago.

Q. And the Los Angeles files would still be here, would they not?

A. That is right. I think there are also some cases of confusion down in the Dallas office, that we didn't even bring into the case at present.

Q. A good share of the confusion perhaps, if not over 90 per cent of it, relates to governmental jobs, does it not, such as this crating contract that you mentioned and the various government jobs that were mentioned by Mr. Adams?

A. No; I wouldn't say that. The people that have called us and were mistaken in their calls did so through reference to the telephone book, I believe, or that is the impression I got. I don't know how the Base got their confusion but, if you look in

Defendant's Exhibit OO (Continued)
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the telephone book and turn the pages, you come to "National" and you call and it is the wrong one.

Q. You know, do you not, Mr. McKee, that there are, roughly, twenty or more national transfer companies, national van companies, and national storage companies, in the moving and storing of household goods, that have the word "National" in them, isn't that correct?

A. I don't know what number of lines, whether freight or van lines or just a little local mover, might have the name "National" in connection with their trade name. I haven't found twenty.

Q. Let's say quite a number of them, isn't that true?

A. There is just one foreign company, that is not related to National Van Lines, in the State of California, to my knowledge, at the present time, which is Al Dean's company. There was a small company on the south side that started to use the name and we got them off of it and told them they were going to have trouble if they continued and, as far as I know, they discontinued using it.

Mr. Fihe: The south side of where?

A. Of Los Angeles.

Mr Von Herzen: Q. Do you feel that the word "National" has some advantage in its use as a part of the name of the business?

A. In our case, a 48-State operator, it is a national line in scope and we have had this name since 1929 as "National," considering our prede-

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

cessor. And we have the national colors that we adopted and, to us, it means everything, and in the book the stripes of the emblem are confusing to the trade.

Q. I haven't gotten to the emblem yet. I was just referring to the use of the word "National."

A. As the Base did, they just grabbed the address "124" and sent Al Dean's bid to us. Whether it is laziness on the part of the individual looking for the name or what, I don't know.

Q. In other words, you think that the word "National" may have some advertising advantages that you would like to keep for your company?

A. Well, yes, for this reason, that we have been in business all these years hauling or doing th volume you read off, bringing thousands of people into California, and we want to move them back. We don't want Al Dean to move them for us. And they remember "National." Whether they remember National Van Lines or just the name "National" I don't know, but we want that return load business and want the advantage of all the advertising we have done all of these years.

Q. Do you think the word has some connotation that you are able to go everywhere and deliver goods no a national scale?

A. Yes; this gives it a far more descriptive name than "Allied." That just means a grouping of van lines, but National Van Lines means national in scope.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. As to the United States? Is that what you have in mind? A. That is right.

Q. As to this emblem you mentioned, that you adopted, the national emblem, you do know, do you not, that that is the emblem of the President of the United States? A. That particular shape?

Q. Yes.

A. No. I was the one who formed the first emblem and I didn't copy it from the President of the United States or from anyone else. It is a national emblem and has a similarity to other emblems, road signs, and what-not.

Q. In other words, the exterior shield shape is the same shape as you find on road signs of the United States?

A. It has a similarity; yes.

Q. Do you know that the red and white stripes are a national emblem adopted by Congress for use of the executive department?

A. No; I am not that well up on my history. I didn't know that.

Q. You do know that it is used quite generally by many, many fields of business, such as the Union Pacific Railroad, for example?

A. Well, the shape of every emblem is a little different. They do have the red stripes and we have no bone to pick with the Union Pacific because it is a railroad line, but we do have a bone to pick with any van lines because of confusion.

Q. When did you adopt that emblem?

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

A. We adopted it, I believe, in 1930.

Q. When you say "We," that would exclude you, would it not?

A. I mean it started with the predecessor, National Shippers and Movers. I say "We" because I am connected with the company.

Q. Was it registered anywhere at that time?

A. No; it was not registered.

Q. Do you have some records with you indicating that it was started in that year or thereabouts? Do you have some of the older records?

A. I believe that Mr. Groen filed some records, on the instigation of this suit, showing freight bills or invoices of that early date with the emblem on them.

Q. It is a fact, is it not, that you had a great deal of your business, your trucks and your letterheads and freight bills and what-not, that did not have that emblem as late as the year 1942?

A. That did not have it?

Q. Right.

A. I wouldn't understand that because I located those old invoices or letterheads for Mr. Groen, and I was quite certain that they went back to that early year that I mentioned, to 1930.

Q. Could it be possible, Mr. McKee, that a share of your printed matter had the emblem and another share did not have?

A. You said as late as 1942, did you? We incorporated in 1934 and the emblem went right on. The

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

new stationery then showed the emblem with "National Van Lines." I can't understand that 1942. I don't know where you get that date. I know that National Shipper and Movers were using it because I supplied the letterheads and the invoices and even pictures of the trucks with "National Shippers and Movers" within the emblem.

Q. All of that now reposes, I suppose, with the Patent Office, is that correct, or does Mr. Groen still have it?

A. He has the original material that I gave him. Whether he gave it back, I don't recall. The Patent Office might have some of it in support of the application. I thought that some of it was attached to the complaint, but I don't remember. I thought you had seen it.

Q. We have certain things that are attached to the complaint. As I understand it, the emblem in the form which you now use it was the form that started in 1930, is that correct?

A. About that date. I am not too good on my dates, but about that date.

Q. But it would be prior to 1934, is that right?

A. Definitely; yes. I was questioning whether it was 1929 or 1930. I would say about 1930.

Q. There are other transfer concerns and storage concerns that use a vertical, alternate red and white striped emblem, do they not, right here in Los Angeles?

A. Yes; there is the American Transfer & Stor-

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

age, or something like that, who are using the emblem, that doesn't have the name "National" in it.

Q. Is that the one that uses the words "Nationwide" across the emblem, that has the same color and the same shape and the same stripes, and so forth?

A. Yes. They used to be an agent of ours, too. We had the same problem with them that we have with Al Dean.

Q. What about the concern called "Pan American Storage" or "Transfer Company?"

Mr. Fihe: Objection is made to this line of questioning. The actions of third parties are, obviously, not pertinent in a proceeding between the plaintiff and the defendant here.

Mr. Von Herzen: Q. Do you know, Mr. McKee, how long Pan American has used this emblem?

A. I didn't recall Pan American. When you first mentioned just the shield alone, I thought of the American Transfer & Storage. Pan American used to be our agent, too.

Q. When? What year? Do you know?

A. I am not sure of the date. Pan American and American Van Lines were both our agents some years back.

Q. Mr. McKee, with the use of vertical, alternate red and white stripes, assuming that the names of the concerns were different and the word "National"

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

did not appear, do you believe that would be of any considerable significance?

Mr. Fihe: That is objected to. The witness is not qualified here as a trademark expert.

Mr. Von Herzen: Q. In your operating of the business, do you think it would lose you any business?

A. I think with the emblem of American Van Lines and Pan American, if they have it as you say, it is confusing with National Van Lines who have the same emblem. If emblems mean anything, it must be confusing.

Q. What about just the red and white stripes? Do you think you as an operator of the business would lose any business if somebody else used the red and white stripes, if they didn't use the emblem?

Mr. Fihe: The same objection.

Mr. Von Herzen: Q. Can you answer?

Mr. Fihe: Maybe you would like to have the question read back. A. Yes.

(Question read by the reporter.)

A. The vertical red and white stripes?

Mr. Von Herzen: Q. Yes.

A. In some sort of a shape and emblem, would you say?

Q. Yes; the vertical stripes.

A. Any cases with any emblem would be conflicting with National who use vertical red and white stripes in their emblem.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. But what I asked you is whether or not, as an operator of the business, you think you might lose business by virtue of the red and white stripes being on someone else's emblem that was different in size, shape, and contour.

A. When say confusing, I mean with that goes a loss of business.

Q. You don't really believe you would lose any business by it, do you?

A. If any prospective shipper recalls that National's emblem has red and white stripes and sees an emblem that has red and white stripes and is confused, that business goes to that party.

Q. Mr. McKee, let me ask you this: Do you know of one single instance anywhere, in all of the years you have done business, where a person has taken the business to you or to someone else because they saw vertical red and white stripes and were confused?

Mr. Fihe: That is objected to. As pointed out previously, the witness is not a trademark expert, and it is well-recognized law that it is not necessary to prove actual confusion in cases of this type, but only the possibility of confusion. However, the witness may answer the question if he can.

A. I don't recall any particular case at the moment.

Mr. Von Herzen: Q. Actually, there hasn't been any, has there?

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

A. There could have been many cases, as far as I am concerned.

Q. But you don't know of any, do you?

A. I am not in the sales. My job is the over-all management and our sales managers and our salesmen on the street could know of them and I wouldn't necessarily know of them.

Q. Mr. McKee, prior to your registration of this particular emblem with the Patent Office a year or two ago, along with the name "National Van Lines," was there any registration of that emblem anywhere, either State or federal?

A. No; the registration was more than a year or two ago, but there was no federal registration of it prior to the time that we actually filed it with the Patent Office. It was just common usage of it.

Q. Pardon me; it was 1951 and 1952. It shows that in the complaint. Would you like to see the date? A. Yes. I have forgotten it.

Q. It is at the top. A. Yes.

Q. And turn the next page. Do you see the date at the top? A. Yes.

Q. Was that emblem registered anywhere, either State or federal, prior to September 11, 1951?

A. Not as a trademark; no. It would be in the files of the State and of the Government and all of our stationery, but no official registration of the emblem itself prior to that date.

Q. What do you mean by "in the files of the Government"?

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

A. I mean that the emblem is on everything we use and has been through the years. So the only registration would be in the paper work, in State papers and federal papers.

Q. Do you mean any letters, for example, addressed to some person that runs a Base or something like that?

A. Yes; somebody in the Government or State. It would just be on the stationery but no official registration of it prior to this date.

Q. Are you acquainted with the fact that Mr. Dean is departing from the use of the word "National" in connection with his transfer and storage business?

A. Yes; I have seen some evidence of that. I checked his sign down at San Diego and some of his vans that I saw on the road. If he would just depart all the way now, we would be happy.

Q. One other thing, Mr. McKee. I will refer you to the contract which is attached to the complaint and entitled "Sales Agent Agreemnt," and particularly to page 5 thereof, subparagraph (b), which reads, under the title of Termination:

"This agreement may be terminated at any time upon the written request of the sales agent or the written notice of termination by the company, sent registered mail to the last-known address of the sales agent, provided, however, that, upon such termination, the sales agent shall immediately: (a) return to the general office of the company, at his

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

expense, all unusued sales literature and/or signs and/or selling aids and/or company stationery and/or forms and/or date pertaining to company procedure and records."

A. That "date" seems confusing there.

Q. Then, subparagraph (b):

"Discontinue the use of the names 'National Van,' 'National Van Lines' or 'National Van Lines, Inc.,' in any manner whatsoever."

Now, Mr. McKee, referring to those three specific names that are mentioned there, are those all names that were used by you or the plaintiff company at one time or another?

A. No. What we were trying to say there——

Q. No; I am not asking you for your interpretation. I am asking you whether those three names that you mention there specifically are names that your concern used at one time or another?

A. We used the name "National Van Lines, Inc.," and we were just trying to protect "National."

Q. Is there any place in here whatsoever where you have used or required the agent to discontinue the use of the word "National" standing alone?

A. "In any manner whatsoever" was interpreted to be any variation other than those three examples.

Q. You mean that is the interpretation that you want placed on the contract?

A. That is right. That is the interpretation I have always had, that they couldn't use the name

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

to further their business. In fact, we asked for everything to come back to us, advertising and literature and so forth.

Q. Who prepared this contract?

A. I had a hand in it.

Q. And who else?

A. What date is that contract? I conferred with others; I don't remember who.

Q. This is dated November 7, 1944.

A. I don't remember who I conferred with at the time.

Q. Did you have an attorney?

A. No; I didn't on that, I don't believe.

Q. I notice that the agreement appears to be a blank with the names filled in. I take it you had a number of these, did you not?

A. That was our sales agency agreement.

Q. And your company prepared it, is that correct? A. That is right.

Q. Neither Al Dean nor any of the other persons who signed this document had anything to do with the choice of language or the terminology that was used here, did they?

A. Well, I signed it and I had a choice.

Q. I mean the others.

A. No. Do you mean the salesman himself?

Q. Yes. A. No; he had no choice.

Q. He either signed it or didn't, is that right?

A. Unless there were any deletions suggested by Al Dean. I don't know whether there were any

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

alterations of his agreement or not. If no alterations showed, then it was accepted as is. Sometimes the other fellow doesn't accept it in whole.

Q. I call your attention also to this phraseology on page 2 of the agreement, under the title of Use of Company Name, where it says:

"The sales agent agrees that he will not use the name 'National Van,' 'National Van Lines,' National Van Lines, Inc.,' or any combination thereof, or the company insignia or company advertising for purposes other than transactions resulting from the sales rights granted herein."

A. Yes; "any combination thereof" to me meant using any part of it in combination with something else.

Q. But that is not what it says, is it?

A. It could be interpreted some other way, I presume.

Mr. Von Herzen: I think that is all with the exception of the Public Utilities Commission reports which a certificated carrier must make. Perhaps these things will substitute. May I return these in the same way, Mr. Fihe?

Mr. Fihe: Yes; and I would suggest that you send them back to Mr. McKee.

Mr. Von Herzen: I will drop them off at the Glendale Boulevard address of the plaintiff concern.

Mr. Fihe: That will be fine if you will do it or have somebody do it for you.

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

Mr. Von Herzen: Let me ask you this: In the event we have to have those Public Utilities reports, would Mr. McKee be available after his return from Chicago for that purpose?

Mr. Fihe: May I speak with him about that?

Mr. Von Herzen: Yes, sir.

(Conference between Mr. Fihe and the witness.)

Mr. Fihe: I will let Mr. McKee answer the question.

A. I have reports here, and I think it is what you are asking for, that go from 1943 to 1954. They are monthly and quarterly reports.

Mr. Von Herzen: Q. I think these are the ones. This is the Board of Equalization?

A. Yes.

Q. This is the non-certificated operation. The Board of Equalization doesn't have jurisdiction over the certificated operation. Only the Public Utilities Commission has jurisdiction over that.

A. I see.

Q. There is a form, about that size, that you have to make up. Maybe they are attached here. Here it is. The pink one is it.

A. Do you want all of the pink ones? Those are the quarterly reports I was referring to. I believe these are based on mileage books and not based on revenue.

Q. Would you be willing to leave these and let me look them over and I will turn them over to you?

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

A. Yes; but please keep them in the same way.

.Q I will. I won't change a thing. I think these are the ones.

A. That is all our history, so we will have to get them back.

Mr. Von Herzen: That is all.

Mr. Fihe: No questions. Do you want to waive signature on this deposition?

Mr. Von Herzen: Yes; I will.

The Notary: Mr. McKee, do you waive the reading of and signature to the deposition also?

The Witness: Yes.

State of California,
County of Los Angeles—ss.

I, Ross Reynolds, a notary public in and for said County of Los Angeles and the State of California, do hereby certify:

That prior to being examined the witness in the foregoing deposition, to-wit, F. L. McKee, was by me sworn to testify the truth, the whole truth, and nothing but the truth;

That the said deposition was taken down by me in shorthand at the time and place therein named, and was thereafter reduced to typewriting under my direction, and I hereby certify that the foregoing 51 pages are a full, true, and correct transcript of my said shorthand notes; and I hereby certify that by stipulation and agreement of coun-

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

sel and the witness, the reading, correcting and signing of the deposition by the witness were waived.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 30th day of July, 1954.

[Seal] /s/ ROSS REYNOLDS,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed December 8, 1954.

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(Continued Next Page)

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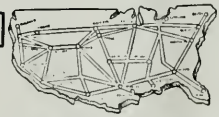

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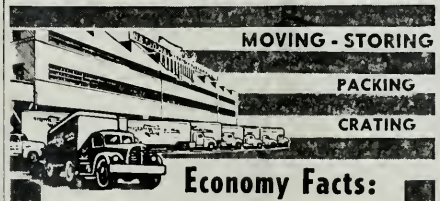

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Pt ffs. Dean Ev. B. E.K.D.

[Endorsed]: No. 14975. United States Court of Appeals for the Ninth Circuit. National Van Lines, Inc., a corporation, Appellant, vs. Alfred E. Dean, trading under the firm name and style of National Transfer & Storage Co., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 15, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14975

NATIONAL VAN LINES, INC.,
Plaintiff-Appellant,

vs.

ALFRED E. DEAN, trading under the firm name and style of NATIONAL TRANSFER & STORAGE CO., Defendant-Appellee.

STATEMENT OF POINTS ON APPEAL

Pursuant to the Rules of this Court, particularly Rule 17(6), Appellant submits the following concise statement of points upon which it intends to rely:

1. The lower Court erred in failing to rule upon the validity of appellant's composite mark National with vertical stripes and the registrations therefor.

2. The lower Court erred in failing to find that appellant's registered composite mark, National with vertical stripes, was infringed by appellee's use of the composite mark, National with vertical stripes, both being applied to identical services, namely, moving household goods by motor van.

3. The lower Court erred in failing to take cognizance of the fact that much confusion resulted from Appellee's use of a mark which was for all practical purposes substantially identical to appellant's mark, both used to designate identical services, and that appellant has substantial prior rights.

4. The lower Court erred in failing to find that both appellant and appellee adopted the composite mark National with vertical stripes as a distinctive name or mark to identify their respective businesses, namely, the service of moving household goods by motor van.

5. The lower Court erred in failing to take cognizance of the fact that appellee, who began by using National as his mark without a design, later, when sharp competition developed with appellant, deliberately added a vertical stripe design simulating appellant's composite mark comprising National with vertical stripes.

6. The lower Court erred in admitting evidence offered by appellee as to alleged third party use of similar marks.

7. The lower Court erred in failing to find that appellee, who was once appellant's licensed sales agent, breached the covenants of his license with respect to use of names upon termination of the license.

8. The lower Court erred in failing to award appellant an accounting for damages and profits by reason of appellee's infringement and unfair competition.

Respectfully,

/s/ ALBERT J. FIHE,

/s/ KENNETH T. SNOW,

/s/ GERRIT P. GROEN,

Attorneys for Plaintiff-Appellant

Certificate of Service attached.

[Endorsed]: Filed December 22, 1955. Paul P. O'Brien, Clerk.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL VAN LINES, a corporation,
Appellant,

vs.

ALFRED E. DEAN trading under the firm name of NATIONAL TRANSFER & STORAGE CO.,
Appellee.

14073
1493

Appeal from the U. S. District Court for the Southern District of California—Central Division

APPELLANT'S BRIEF

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL VAN LINES, a corporation,
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ALFRED E. DEAN trading under the firm name of NATIONAL TRANSFER & STORAGE CO.,
Appellee.

Appeal from the U. S. District Court for the Southern District of California—Central Division

APPELLANT'S BRIEF

I. STATEMENT

This appeal arises from an action for infringement of appellant's* registered service mark, for unfair competition and breach of contract. The lower court dismissed the complaint without comment, having adopted verbatim defendant's findings and conclusions. Plaintiff charges that its rights in the composite mark, NATIONAL, with vertical stripes, has been infringed by reason of appellee's* use of the composite mark, NATIONAL, with vertical stripes for identical services; namely, moving household goods by motor van. Plaintiff further charges that defendant's acts are a violation of the agreement which existed between the parties prior to February 20, 1950.

* Hereafter, appellant will be referred to as plaintiff and appellee as defendant.

Plaintiff, NATIONAL VAN LINES, INC., is an Illinois corporation, engaged in the long distance moving of household goods by motor van throughout the entire United States. Defendant, Alfred E. Dean, operates under the firm name and style of National Transfer & Storage Co., and is also engaged in moving household goods by motor van in inter-state commerce. Both plaintiff and defendant are particularly active in the State of California.

For more than two decades plaintiff has identified itself by the composite mark comprising the word "NATIONAL" and a series of vertically disposed red and white stripes.* Defendant has also been in business for many years and has operated under several names. Defendant in November, 1944, adopted the name National Transfer & Storage Co., and at that time entered into an agency relationship with plaintiff. This agency relationship specified the use of plaintiff's advertising which included plaintiff's mark. The agency agreement was terminated February 20, 1950. Late in 1949, just before the termination of the agency relationship, defendant, in addition to using the mark dominated by the word NATIONAL, also adopted a series of vertically disposed red and white stripes* (R. 234-5).

Plaintiff obtained two United States registrations.* The first registration, No. 548,018, comprised its entire name in conjunction with the vertical red and white stripe. *This registration disclaimed all matter but the word NATIONAL and the stripes.* The second registration, No. 563,950, was for the name NATIONAL VAN LINES, INC. only, disclaiming all words but NATIONAL. Both registrations are limited to the service of transporting goods by motor van. Both were obtained under the broad provi-

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* Reproduced at the end of this brief.

sions of the principal register of the new Lanham Trademark Act of 1946.

There was no contest with respect to jurisdiction. Plaintiff urges that the lower court and this court have jurisdiction under 28 USCA Section 1338* and 15 USCA, Section 1121.** In the complaint, plaintiff alleges infringement and unfair competition under the trademark laws of the United States and that there is diversity of citizenship and that the amount involved exceeds the sum of $3,000.00. The record supports these averments.

II. ABSTRACT OF THE CASE

Plaintiff's business which is confined to the moving and storage of household goods, was started by its predecessor about 1928. Corporate plaintiff was organized in 1934 at which time it took over all assets of its predecessor (R. 75). NATIONAL has been used prominently as the dominant part of plaintiff's name from the very start in 1928; however, in 1930 plaintiff adopted the composite mark comprising NATIONAL with vertical stripes. Ever since this early period plaintiff always used the composite mark NATIONAL with the vertical stripes in a very prominent manner for all phases of its business (R. 75). Plaintiff's business soon became nationwide in scope and it so operated for many years. It has agents throughout the United States (R. 77, 80). The greatest portion of its business originates in California (R. 77).

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* "(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

** "The district and territorial courts of the United States shall have original jurisdiction, the circuit courts of appeal of the United States and the United States Court of Appeals for the District of Columbia shall have appellate jurisdiction, of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties. July 5, 1946, c. 541, Title VI, Section 39, 60 Stat. 440."

Defendant began operating under the name NATIONAL TRANSFER & STORAGE in 1944 when he entered into a sales agency relationship with plaintiff (R. 220). Under the terms of the agency agreement both parties worked closely together. Defendant, of course, used plaintiff's advertising material under the agreement.

In February, 1950, defendant suddenly cancelled the agency agreement. Notwithstanding this cancellation, defendant continued to trade upon plaintiff's reputation and good will which it previously shared under the agreement as an authorized sales agent. Demands upon defendant to discontinue use of plaintiff's composite mark were refused.

Late in 1949 when defendant was preparing to cancel its sales agency agreement, under which it had been operating with plaintiff since 1944, he adopted a series of vertical stripes to use with "NATIONAL" as a composite mark. Previously, defendant hadn't used such vertical stripes (R. 12-20, 234-5).

As a result of these actions by defendant, there were numerous instances of confusion and some palming off. The evidence demonstrates how customers who had dealt with defendant wrote or phoned plaintiff about various matters concerning service. Many of these communications were complaints intended for defendant although directed to plaintiff. Several witnesses testified as to this confusion.*

The record abounds with testimony and exhibits showing how extensively plaintiff advertised its services, spending several hundred thousand dollars advertising its services under the mark here in issue. This advertising was channelled through every useable media such as direct mail, magazines, radio, television and the like. Plaintiff

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* The confusion evidence is summarized later in a special section.

also used its mark extensively in connection with its equipment. It appears on uniforms of its employees, packing boxes, blankets, barrels, trucks and the like (R. 82, 102).

Since the Lanham Act, plaintiff acquired two federal registrations. Consequently it enjoys the broadest possible registration rights. Notwithstanding a few variations, practically all of the evidence shows that plaintiff's mark and trade name comprise the inseparable combination, NATIONAL with vertical stripes, for which it obtained registration (Ex. 1-4, R. 78, 79).

Defendant acknowledges the sales agency agreement and that he operated under it until he cancelled in 1950. Defendant also admitted that prior to the time he terminated the sales agency agreement he negotiated for a new agency with Republic Van Lines, a coast-to-coast competitor of plaintiff (R. 236-8). There is no dispute about the fact that defendant continued to use NATIONAL as a dominant part of its mark or trade name and that just prior to termination of the sales agency agreement defendant added the vertical stripe design to its trade name and then continued to use the composite mark NATIONAL with vertical stripes.

Notwithstanding the attempt by defense counsel at the trial to characterize "NATIONAL" and "the vertical stripes" as merely descriptive, defendant himself freely admitted that he used NATIONAL with the vertical stripes *as a mark.* Upon discovery deposition he was asked:

> "Q. What was the occasion for adopting this design (vertical stripes) along with the name (NATIONAL)?"

In reply he said:

> "A. Oh, my feeling that it added a lot of trademark value and I think that practically every company has some sort of trademark to identify their service." (R. 407).

Defendant does not dispute that he uses NATIONAL with vertical stripes as a trademark. Nevertheless, his counsel directs his defense entirely to challenging the validity of plaintiff's mark. There is no dispute that the marks are used for identical services, or that plaintiff has prior use by some 20 years.

Defendant has introduced testimony and many exhibits (subject to plaintiff's objections), all apparently directed to establishing that there is no mark significance in "NATIONAL" and that there is no mark significance in the vertical stripes. Defendant's evidence abounds with pages of telephone directories, reports on trademark registrations and similar material, which show use of "NATIONAL" as a mark or a name for every conceivable type of product or service. Evidence of the same character is of record showing that vertical stripes are old and have been repeatedly used as marks or parts of names for all types of products and services. The word "NATIONAL" and the "vertical stripe design" have long been recognized as good marks. Plaintiff and defendant do not use NATIONAL or the stripes separately. *They are always used together to make a composite mark.*

Defendant on cross examination admitted that confusion existed (R. 242-3, 438-9).

Defendant has recently acquired Commerce Commission rights previously owned by Knowles Van Lines which now also enables defendant to operate substantially from coast to coast in complete competition with plaintiff (R. 243-4, 248).

In summarizing this abstract of the evidence, attention is especially invited to the fact that this action is different from the usual cases in this field because:

1. Both plaintiff and defendant use the composite mark

NATIONAL with vertical stripes in a substantially identical manner;

2. Both plaintiff and defendant are engaged in identical businesses, namely, moving household goods by motor van;

3. There is no dispute as to plaintiff's first use of the composite mark NATIONAL with stripes, as plaintiff began using this mark some twenty years prior to defendant;

4. Plaintiff enjoys broadest rights obtainable under United States registrations. (Defendant has no registrations.)

This leaves only one basic issue; namely, whether plaintiff's mark is so weak and so restricted as to preclude relief against defendant notwithstanding the deliberateness of his acts which have resulted in confusion in the trade and facilitated palming off defendant's services as plaintiff's.

III. SPECIFICATION OF ERRORS

Heretofore plaintiff has specified for the transcript a summary of the errors which it urges (R. 495-7). These are as follows:

1. The lower court erred in failing to rule upon the validity of appellant's composite mark NATIONAL with vertical stripes and the registrations therefor.

2. The lower court erred in failing to find that appellant's registered composite mark, NATIONAL, with vertical stripes, was infringed by appellee's use of the composite mark, NATIONAL, with vertical stripes, both being applied to identical services; namely, moving household goods by motor van.

3. The lower court erred in failing to take cognizance of the fact that much confusion resulted from appellee's use of a mark which was for all practical purposes sub-

stantially identical to appellant's mark, both used to designate identical services, and that appellant has substantial prior rights.

4. The lower Court erred in failing to find that both appellant and appellee adopted the composite mark NATIONAL with vertical stripes as a distinctive name or mark to identify their respective businesses, namely, the service of moving household goods by motor van.

5. The lower court erred in failing to take cognizance of the fact that appellee, who began by using NATIONAL as his mark without a design, later, when sharp competition developed with appellant, deliberately added a vertical stripe design simulating appellant's composite mark comprising NATIONAL with vertical stripes.

6. The lower court erred in admitting evidence offered by appellee as to alleged third party use of similar marks.

7. The lower court erred in failing to find that appellee, who was once appellant's licensed sales agent, breached the covenants of his license with respect to use of names upon termination of the license.

8. The lower court erred in failing to award appellant an accounting for damages and profits by reason of appellee's infringement and unfair competition.

The foregoing specification of errors will be fully developed in the argument section.

IV. PROCEEDINGS BEFORE THE LOWER COURT

It is believed that this court will be interested in a chronological summary of the proceedings before the lower court.

Nov. 26, 1952 Plaintiff filed its complaint.

Mar. 25, 1953	Three months later defendant filed its first motion to dismiss the complaint or in the alternative, asked for more definite statement.
Apr. 23, 1953	Plaintiff filed a brief amendment to its complaint.
May 11, 1953	Defendant filed its second motion to dismiss.
Dec. 31, 1953	The court entered an order denying defendant's second motion to dismiss.
Feb. 3, 1954	Defendant filed its first answer. *This was some 15 months after plaintiff filed its complaint.*
June 15, 1954	The court held a pre-trial hearing.
Oct. 4, 1954	Defendant filed an amended answer.
Dec. 17, 18, 1954	The case was tried.
June 21, 1955	Counsel received the following memorandum from the Clerk of the Court:

"Re: National Van Lines, Inc., vs. Alfred E. Dean, etc., Case No. 14, 783-T Civil.

Gentlemen:

Please be advised a minute order has been entered in the above-entitled matter, this date, upon the direction of Judge Tolin, that the court finds in favor of the defendant and orders judgment accordingly, counsel for the defendant to prepare findings of fact and conclusions of law and judgment under Local Rule 7, and to have judgment for costs.

Very truly yours,

JOHN A. CHILDRESS, Clerk

By WM. A. WHITE, Deputy Clerk."

Oct. 19, 1955	Counsel received the following memorandum:

"Re: National Van Lines, Inc., v. Dean, etc.
No. 14783-T

You are hereby notified that judgment has been docketed and entered this day in the above entitled case herein.

Dated: Los Angeles, California,
October 19, 1955

Clerk, U. S. District Court

By
C. A. Simmons, Deputy Clerk"

In response to the clerk's memorandum of June 21, 1955, defendant promptly filed Findings of Fact, Conclusions of Law and Judgment. (R. 52-61).

Plaintiff then filed proposed alternate Findings and Conclusions with a brief supporting memorandum (R. 41-52).

It will be noted that the court entered the Findings and Conclusions of defendant exactly as submitted and without comment, notwithstanding plaintiff's memorandum inviting attention to inaccuracies and incompleteness in many respects of defendant's proposed findings (R. 46-52).

Attention is also invited to the fact that during the trial, after substantial evidence had been presented, the court said:

"Now I will tell you and Mr. Groen (plaintiff's counsel) what my tentative thought is about it. It seems to me that defendant by the use of his 'National Transfer & Storage' has prima facie infringed 'National Van Lines' because of the direct competition. And there has been some evidence of confusion already." (R. 138-9.)

In view of the foregoing statement of the court about infringement and confusion, and the fact that the record is replete with instances of confusion, it is very surprising

that the court should later accept the findings as proposed by defendant, especially findings 20 and 21 (R. 59).*

These findings are clearly contrary to the record and indeed the court's own prior pronouncement.

The lower court also failed to rule upon plaintiff's objections to much of defendant's evidence. The major portion of defendant's evidence comprised testimony and exhibits as to alleged uses by strangers to this action of NATIONAL marks and vertical stripes marks. According to many decisions such evidence is not admissible, as alleged wrongs by others cannot justify defendant's wrong.

V. ARGUMENT

A. Summary

This action is based upon the United States trademark laws, particularly 15 U.S.C.A. 1114 (1) and the general law of unfair competition. The pertinent portion of the statute with respect to infringement provides:

> "Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, *or colorable imitation* of any regis-

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* "20. Defendant has not committed any act designed or intended to palm off his services as those of plaintiff, or any act intended or designed to deceive, mislead or create any confusion in the mind of the public, but, on the contrary, defendant in good faith and with plaintiff's knowledge and acquiescence, adopted and built up his own business under the descriptive name 'National Transfer & Storage Co.' and said map symbol, and in so doing has made only fair and lawful use of the generic words comprising said name.

"21. Other than possible isolated instances of confusion which might be expected to result among careless observers from the fair and truthful use by plaintiff and defendant, as well as many other transfer companies, of purely descriptive names having a common geographical prefix, there is no likelihood of any confusion occurring in the public mind as between plaintiff and defendant or their services."

> tered mark in connection with the sale, offering for sale, or advertising of any goods or *services* on or in connection with which such use is *likely to cause confusion or mistake* or to deceive purchasers as to the source of origin of such goods * * * *shall be liable* to a civil action by the registrant for any or all of the remedies hereinafter provided." (Emphasis supplied)

Plaintiff has complied fully with the statutory requirements for registration and is entitled to enjoy all the rights conferred thereby (Ex. 3, 3a, 4 and 4a, R. 9-12).

With respect to plaintiff's exclusive right to use its registered mark, attention is invited to the pertinent portion of 15 U.S.C.A., 1115(a), which states:

> "Any certificate of registration issued under * * * the Act of February 20, 1905, or of a mark registered on the principal register provided by this chapter and owned by a party to an action shall be admissible in evidence and *shall be prima facie evidence of registrant's exclusive right to use the registered mark* in commerce on the goods or *services* specified in the certificate subject to any conditions or limitations stated therein * * *." (Emphasis supplied.)

Plaintiff charges infringement of its composite mark and its two federal registrations covering this mark which comprises NATIONAL with the vertical stripes, specifically limited to services involving the transportation of goods by motor van. These registrations* exist under the Trademark Act of 1946.

During the trial defendant made various attempts to attack these registrations. Its evidence, however, (if admissible) was apparently even in defendant's opinion, weak because defendant did not even suggest to the lower court that there should be findings or conclusions holding the

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* Reproduced at the end of this brief.

trademarks and registrations invalid. The court consequently did not dispose of the issue of validity.

It is of course elementary that there is a very heavy burden upon the one attacking the validity of a registration, and that federal registration establishes prima facie validity, ownership and the exclusive right to use the mark. These principles have been recognized by an impressive line of authorities. The controlling statute provides:

> "A certificate of registration of a mark upon the principal register provided by this chapter shall be prima facie evidence of the validity of the registration, registrant's ownership of the mark, and of registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate, subject to any conditions and limitations stated therein" (15 U.S.C. 1057b).

Among the leading authorities which have consistently enunciated these principles are the following:

Barbasol Co. v. *Jacobs,* 160 F. 2d, 336 (C.C.A. 7).

Weiner, et al. v. *National Tinsel Mfg. Co.,* 123 F. 2d, 96, 98 (C.C.A. 7).

Hemmeter Cigar Co. v. *Congress Cigar Co., Inc.,* 118 F. 2d 64, 68 (C.C.A. 6).

Feil v. *American Serum Co.,* 8 Cir., 16 F. 2d 88, 89 (C.C.A. 8).

Hygienic Products Co. v. *Judson Dunaway Corporation,* 81 Fed. Supp. 935. (N.H.)

Vickers, Inc. v. *Fallon,* D. C. 48 F. Supp. 221 (D.C. Michigan).

Coca-Cola Co. v. *Dixi-Cola Laboratories, Inc.,* 31 F. Supp. 835, 842 (D.C. Maryland).

Grove Laboratories v. *Brewer & Co.,* 1939, 103 F. 2d 175 (C.C.A. 1).

Plaintiff has created vast good will in the composite mark NATIONAL with vertical stripes at great expense. Such good will can be defined as the collective friendliness toward a particular class of articles or services which the public by faith or experience believes to be good. In this instance that good will vests in the composite mark NATIONAL with vertical stripes, of which plaintiff is the unquestioned owner by reason of its first use of the mark and subsequent registration. *Hanover Star Milling Company* v. *Metcalfe,* 240 U.S. 403, 15 U.S.C.A. 1115.

Courts of equity have consistently protected marks and the good will established in them on the theory that one is not allowed to offer his goods or services for sale or to palm off such goods or services as those of another.

McLean v. *Fleming,* 96 U.S. 245.

Hanover Star Milling Company v. *Metcalfe,* 240 U.S. 403.

Mishawaka Rubber and Woolen Mfg. Co. v. *The S. S. Kresge Co.,* 316 U.S. 203.

Stork Club v. *Shahati,* 166 F. 2d, 348 (C.C.A. 9).

Lane Bryant, Inc. v. *Maternity Lane, Ltd. of California,* 173 F. 2d, 559 (C.C.A. 9).

North American Aircoach v. *North American Aviation,* 107 P.Q. 68 (C.C.A. 9).

National Lead Co. v. *Wolfe,* 223 F. 2d 195 (C.C.A. 9th).

In the Mishawaka case at page 205, Justice Frankfurter, speaking for the court, aptly summarized the general principle as follows:

"The protection of trademarks is the law's recognition of the psychological function of symbols. If it is

> true that we live by symbols, it is no less true that we purchase goods by them. A trademark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trademark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress."

Here plaintiff not only is entitled to the protection of its mark on general equitable principles, but it also enjoys the fruits of federal registration for the mark NATIONAL with vertical stripes and is entitled to the broad protection which the trademark statutes provide (15 U.S.C.A. 1114 (1)).

Prior to the passage of the Lanham Act in 1946 it was uniformly held that infringement existed even if there was only a likelihood of confusion between the goods and services of defendant and those of plaintiff when identified by the same or similar marks and that it was unnecessary to prove actual confusion. *Century Distilling Co.* v. *Continental Distilling Corp.,* 205 F. 2d, 140 (C.C.A. 3d); *Barbasol Co.* v. *Jacobs,* 150 F. 2d 336 (C.C.A. 7th). These and similar holdings are now expressly embodied in the language of Section 32 (1) of the Lanham Act previously quoted, 15 U.S.C.A. 1114(1).

Here the marks are for all practical purposes the same and the services are identical. Consequently there is a clear likelihood of confusion. However in this case, as it will be shown, the doctrine of likelihood of confusion need not be asserted because the record is replete with direct evidence of actual confusion.

B. Plaintiff's Composite Mark and Its Registrations Therefor Are Valid

The lower court did not rule upon the validity of plaintiff's mark and the Federal registrations which it obtained therefor. Defendant's counsel, in submitting proposed findings and conclusions at the court's request, avoided this issue by ignoring it. Plaintiff naturally urges that it has a valid mark and valid registrations therefor. This being true, it hardly can be disputed that defendant's use of a mark, of which the dominant features are identical for identical services, is an infringement of plaintiff's clearly established prior rights.

Defendant, through its immediate predecessor, National Shippers & Movers, began using its "NATIONAL" mark in 1928. In 1930 it also adopted the vertical stripes along with its "NATIONAL" mark to make the composite mark, "NATIONAL" which has been used continuously since. Throughout the record it is shown that plaintiff used this composite mark extensively on a coast to coast basis.

Shortly after the adoption of the new 1946 Lanham Trade Mark Act, which for the first time provided that *service* marks could be registered, plaintiff filed application for and obtained two Federal registrations* covering its mark here in suit.

The record with respect to the prosecution of the applications which resulted in the registrations (Exs. II and JJ) shows that all descriptive elements comprising the words "Van Lines, Inc." were specifically disclaimed, and the registrations consequently issued for the dominant features comprising the word "NATIONAL" with the vertical stripes.

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* Numbers 548,018 and 563,950 reproduced at the end of this brief.

Although defendant in its pleadings first denied plaintiff's rights in the mark and the registrations secured therefor, it was hard pressed to challenge this specific right as asserted by plaintiff. The principal defense comprised the offer of testimony and exhibits showing alleged uses by strangers to this proceeding of other separate "NATIONAL" and "vertical stripe" marks in various ways for a variety of other products and services completely unrelated to the services rendered by both plaintiff and defendant. This evidence, though accepted by the lower court, was strenuously challenged by plaintiff.

Plaintiff urges that its rights established in the mark "NATIONAL" with vertical stripes, which have been specifically recognized through the process of Federal registration, under the circumstances as disclosed by the record cannot now be readily assailed. This conclusion is amply supported by the applicable statute 15 U.S.C.A. 1057 (b), and the long line of authorities interpreting such rights. Attention is again invited to that line of cases headed by *Barbasol* v. *Jacobs,* supra, cited in the Summary section of this brief.

Plaintiff does not dispute that there are many uses of "NATIONAL" and that there are many vertical stripe designs in use separately, but not as a composite mark. Such facts, however, do not support defendant's contention that "NATIONAL" is wholly devoid of mark or trade name recognition. *Significant is the fact that defendant himself is using "NATIONAL" with the vertical stripes as a mark.*

It is not disputed that these two elements can also be used in a descriptive manner. However, the descriptive meaning is not an issue. There is no dispute but that both plaintiff and defendant use "NATIONAL" and the vertical stripe design as a symbol or name of identification. This disposes of all arguments that these devices cannot be exclusively appropriated to identify a particular product or

service. Although "NATIONAL" or the stripe design may not be in the category of unique or strong marks, they certainly are capable of mark or name significance.

In *Continental Corporation, et al* v. *National Union Radio Corporation, et al,* 67 F. 2d 938 (C.C.A. 7), the word "NATIONAL" was sustained as a trademark for radio tubes. In *National Fireworks, Inc.* v. *National Cooperatives, Inc.,* 51 U.S.P.Q. 412, the Commissioner of Patents sustained an opposition wherein opposer claimed exclusive rights in the word "NATIONAL" as a mark.

With respect to asserting exclusive rights in stripe designs as a mark or symbol of identification, attention is invited to *Barbasol Co.* v. *Jacobs,* 160 F. 2d 336 (C.C.A. 7) wherein the appellate court sustained the validity of Barbasol's registration consisting of "parallel diagonal blue, white and red stripes in the color sequence of blue—white—red—white—blue—white—red—white." At page 339, in sustaining Barbasol's charge of infringement and the validity of the stripe design mark, the court said:

> "We conclude that plaintiff's mark as described and used with its multi-colored striped border surrounding a blue panel, constitutes a valid trademark."

The significant thing about the Barbasol case is that the court sustained as a valid mark the stripe design *by itself.* Obviously, the present case is stronger as plaintiff asserts the vertical design as a mark of identification used in conjunction with the word "NATIONAL."

C. Defendant's Use of "NATIONAL" with Vertical Stripes Infringes Plaintiff's Rights in the Mark "NATIONAL" with Vertical Stripes.

The record shows that:

1. Plaintiff adopted "NATIONAL" as its mark in 1928.

2. Plaintiff adopted "NATIONAL" with the vertical stripe design in 1930 and has so used it continuously since that time.

3. Defendant had operated under various marks or names until 1944. Then it adopted a "NATIONAL" mark.

4. In late 1949 or early 1950 defendant added the vertical stripe design to make his composite mark here in issue.

5. Both plaintiff and defendant are engaged in the moving business. Plaintiff has been in coast-to-coast operations for many years; defendant has just expanded into coast to coast business.

These facts having been established, it is necessary to determine only in the words of the statute, 15 U.S.C.A., 1114 (1); whether defendant's NATIONAL with vertical stripes mark is such a "colorable imitation" of plaintiff's NATIONAL with vertical stripes mark as "is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services. * * *" To determine whether the marks in issue are confusingly similar, we first turn to the most simple test; namely, the side-by-side comparison of the marks.

The application of this test requires recognition of the well-established rule that the respective marks must always be considered in their entireties and without extraneous matter and embellishments which may be varied from time to time. *B. F. Goodrich Co.* v. *Hockmeyer et al,* 40 F. 2d 99; *Celotex Co.* v. *Millington,* 49 F. 2d, 1053.

In disposing of an attempt to consider a composite mark piecemeal like defendant is attempting to in this instance, Mr. Justice Holmes said in *Schlitz Brewing Co.* v. *Huston Co.,* 250 U.S. 28: "It is a fallacy to break the faggot stick by stick."

Attention is invited to the respective marks of plaintiff and defendant which for convenience have been reproduced at the conclusion of this brief, both in red, white and blue as most frequently used, and in black and white as used in directories. The side-by-side comparison of the respective marks speaks for itself.

The controlling statutes and authorities, though expressing it in various ways, all embrace the generally accepted rule that confusion or the mere likelihood of confusion arising from imitation or even colorable imitation will be enjoined.

Restatement of the Law of Torts, Vol. III, Section 717 (1), sets forth the following general rule with respect to similarities constituting infringement:

> "(1) One infringes another's trade name, if (a) without a privilege to do so, he uses in his business, in the manner of a trademark or trade name, a designation which is identical with or *confusingly similar* to the other's trade name * * *" (Emphasis supplied).

Cole v. *American Cement & Oil Co.,* 130 F. 703, 705, gives the following definition which is frequently cited:

> "An infringement of such trademark consists * * * in the use of an imitation in which the difference is colorable only, and the resemblance avails to mislead so that the goods to which the spurious trademark is affixed are likely to be mistaken for the genuine product."

In *Mishawaka* v. *Kresge,* 316 U.S. 203, 205, Judge Frankfurter defined infringement as the act of "poaching upon the commercial magnetism" of the symbol that the trademark owner has created.

Nims, The Law of Unfair Competition and Trademarks, Fourth Edition, Vol. 1, page 675, says:

> "Where the similarity is sufficient to create a false impression to the public mind, and is of the character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party right to redress."

Defendant has made a desperate attempt to show that the mark in issue is in fact no mark at all, and that anyone is free to use "NATIONAL" with vertical stripes for any purpose, particularly in connection with the moving and storage business. Defendant has been industrious in seeking out vertical stripe designs used by various persons and firms for a variety of products and services. Notwithstanding that plaintiff urges such evidence to be wholly irrelevant and inadmissible, it is quite apparent that if such evidence is to be considered, it cannot detract from the significant rights established by plaintiff.

If defendant's theory were followed to its logical conclusion, we must concede that the word "NATIONAL" and the stripe design are completely within the public domain and wholly incapable of any trade name or mark significance. In urging this theory, defendant must dissect the mark, considering "NATIONAL" separately and the vertical stripes separately. In view of the evidence, and the applicable authorities, this obviously cannot be done. Therefore, the alleged defense that vertical stripes and the word "NATIONAL" are wholly in the public domain, must fail entirely.

The most cursory examination of the evidence establishes without dispute that plaintiff uses the combination comprising "NATIONAL" *with* vertical stripes in true mark fashion. Recognizing this, we examine defendant's use of the word "NATIONAL" and vertical stripes. Again, a cursory examination of defendant's evidence shows that he too relies heavily upon the identity or mark significance of "NATIONAL" with vertical stripes. Here it is helpful

to again call attention to defendant's own testimony (R. 246). In response to the question: "What was the occasion for adopting this design along with the name?", he said: "Oh, my feeling that it had a lot of trademark value and I think that practically every company has some sort of trademark to identify their services."

This of course makes it clear beyond dispute that defendant cannot be sincere in urging that the word "NATIONAL" and the vertical stripe design is meaningless and wholly within the public domain. Defendant unquestionably employs this word and the vertical stripes as a true mark of origin in exactly the same manner as plaintiff has done for many years.

Because defendant's plan of imitation is so evident, he is forced to strike in many directions to avoid the impact of his close imitation. This has forced defendant, notwithstanding clear evidence to the contrary, to assert that neither "NATIONAL" nor vertical stripes can function as a mark of identity. The fallacy of this position is of course obvious. Not only have "NATIONAL" marks been repeatedly sustained (*Continental* v. *National Radio*, 67 F. 2d 938; *National Fireworks* v. *National Cooperatives,* 51 U.S.P.Q. 412; *National Dryer Corp* v. *National Drying Co.* 129 F. Supp. 390) but also marks comprising alternate stripes, such as here in issue have been sustained (*Barbasol* v. *Jacobs,* supra).

After suit was filed, defendant began in some instances to substitute the words "Dean Van Lines" for "National Transfer & Storage Co." During the trial attempts were also made to undermine plaintiff's position by suggesting that plaintiff had positively abandoned the name "National Transfer & Storage Co." in favor of "Dean Van Lines" (R. 232-3). Whether or not defendant intends to adopt and use "Dean Van Lines" permanently and exclusively may be

doubted from the record as defendant himself testified (R. 413-5):

"Q. In what respect is that changed?

A. We will now use the name 'Dean Van Lines.'

Q. Is there anything in there that says 'National Transfer & Storage'?

A. Oh, yes, we always have that on this in all of them.

Q. The same way?

A. Yes, the same way, 'Also Known As.'

Q. You are going to use both?

A. That is right.

Q. That is the way it will appear in the next directory?

A. That is correct.

* * * *

A. We use the name 'Dean Van Lines.' If we elect to use the name 'National Transfer & Storage,' we would just as you see it there.

Q. What do you mean you would?

A. Our option.

Q. Wouldn't you say you were using both names all over?

A. All over, yes."

Even if defendant should abandon "National Transfer & Storage Co." in favor of "Dean Van Lines," which he obviously won't do, defendant's use of the vertical stripes will continue to cause confusion.

That defendant considers the vertical stripe design a valuable mark is too apparent for argument. He uses it frequently; indeed, the suggestion that he is to substitute

"Dean" for "National" but is unwilling to give up the vertical stripes is a significant fact.

As the evidence shows, one of the best media of advertising for the household moving field is local classified directories. As both plaintiff and defendant use the vertical stripes with "National" as a unit, it is obvious that one turning to a directory would look for the vertical stripes as a symbol of immediate identity. It is easy to remember and easily spotted.

Courts of equity, dealing with infringement such as this, have spoken in no uncertain terms. In that respect the record of this court is impressive:

> *Sunbeam Furniture Corp.* v. *Sunbeam Corporation,* 191 F. 2d 141.
>
> *North American Air Coach Systems, Inc.* v. *North American Aviation, Inc.,* 107 U.S.P.Q. 68.
>
> *National Lead Co.* v. *Wolfe,* 105 U.S.P.Q. 462.
>
> *Lane Bryant, Inc.* v. *Maternity Lane Ltd.,* 173 F. 2d 559.
>
> *Mershon Co.* v. *Pachmayr,* 220 F. 2d 879.

The precedent established in the *North American* case, supra, is believed to be of particular interest because the factual situation in that case has so much in common with the present issues. In that case as here, defendant sought to justify its infringement by urging that the mark was merely geographical. In disposing of this contention, the court said:

> "But this does not mean that a name of territorial origin may not acquire a secondary or fanciful meaning connected. When this occurs, the proprietorship in the designation or mark will be afforded as complete protection as if it were a 'stronger' mark at the inception."

Particularly apt to the present facts is the following quotation:

> "The use by defendants in this connection of a copy of the stylized design which plaintiff had invented, varying the design only enough to permit defendants to hope that it would encourage the public to believe defendants were plaintiff, but enough to confuse the judges into the belief that the defendants are in good faith."

It is also urged that the conclusions expressed in the recent *National Lead* case are closely parallel here and should be highly persuasive in resolving the present issues.

Attention is also invited to District Court cases in this circuit which unequivocally stand for the principles urged here:

Silvers v. *Russell, et al.*, 113 F. Supp. 119.

Brooks Brothers v. *Brooks Clothing of California, Ltd.*, 60 F. Supp. 442.

Ball Chemical Co. v. *Hodnefield, et al.*, 108 U.S.P.Q. 359.

In *Sears Roebuck and Co.* v. *A. L. Johnson*, 219 F. 2d 590, the Court of Appeals for the Third Circuit also decided a trade name issue for services very similar to this case. There plaintiff used the designation "Allstate" in connection with automobile insurance and financing. Defendant adopted "All-State School of Driving" as its name for a school to teach driving. The lower court refused to grant relief but the Court of Appeals had no difficulty in resolving the issue for plaintiff. In setting aside the findings, the Appellate Court said:

> "In disturbing the District Court's findings of basic facts, this court is guided by the 'clearly erroneous' provision of Rule 52(a) * * *. This court, by examin-

ing the basic facts, found by the District Court, can determine as advantageously as the District Court can whether or not an inference of likelihood of confusion is warranted." (citing numerous authorities)

In the *Allstate* case, relief was granted even though the services rendered by the respective parties were in no sense the same. The Appellate Court concluded that there was probability of confusion.

Judge Nordbye aptly summarized issues of this kind in the recent decision of *Time, Inc.* v. *Life Television Corp., et al.,* 123 F. Supp. 470, at page 475:

> "* * * The conclusion is inescapable that the defendants set out with the purpose of trading upon plaintiff's established trademark and deliberately assimilated plaintiff's *style* in order to do so. A finding of a likelihood of confusion under such circumstances is abundantly supported by the authorities.
>
> "*It is said that imitation may often supply the place of proof—in the absence of evidence to the contrary the court accepting the defendant's own estimate of the probability of confusion.*" (Citing cases) (Emphasis added).

Obviously defendant attempted to "employ enough points of similarity to confuse the public with enough points of difference to confuse the courts." *Baker et al.* v. *Master Printers Union of New Jersey,* 34 F. Supp. 808, 811.

D. The Evidence Shows Extensive Confusion and Some Direct Palming Off.

A resume of plaintiff's position and defendant's conduct brings into sharp focus the fact that defendant's activities have enabled him to reap from a field where he has not sown. The record shows confusion among the public who employ plaintiff's and defendant's services. There is even

confusion among those in the moving industry who find it necessary to deal with plaintiff and defendant from time to time.

Plaintiff's initial use of "National" was established through a predecessor as early as 1928. In 1930 plaintiff began using "National" with the vertical stripes. Although plaintiff has been well established in its field for many years, the record shows (Ex. 35) that its activities were greatly expanded in the last few years. Plaintiff's services under its composite mark NATIONAL with vertical stripes are known throughout the entire United States and particularly the State of California. It has over 200 sales representatives throughout the United States. Its composite trademark is prominently displayed in every manner possible. It appears on its trucks, its packaging boxes, wrapping blankets, employees' uniforms and related devices (Exs. 29, 30, A).

Plaintiff's services all carried on under the composite mark NATIONAL with vertical stripes has exceeded many millions of dollars. Plaintiff's sales of its services have risen from $125,000.00 in 1935 to $3,500,000.00 in 1954 (Ex. 35, R. 472,3).

Plaintiff's advertising has been extensive. At the time of the trial its direct advertising, that is, exclusive of its local sales agents, all of which centered about the mark NATIONAL with vertical stripes, involved an expenditure in excess of $90,000.00 annually (Ex. 34). In addition, plaintiff did a substantial amount of cooperative advertising with its sales agents. Recently it released a film for use in television advertising involving an expenditure in excess of $100,000. Plaintiff employs the usual effective advertising media, including radio, television, trade magazines, extensive classified telephone directory listings, direct mailing and the like.

In the face of this record defendant, after discontinuing his relationship with plaintiff as sales agent, added a vertical stripe design to his trade name dominated by the word NATIONAL, and then launched out to compete with plaintiff. Shortly thereafter, defendant also expanded into coast to coast competition with plaintiff.

Defendant's venture produced the inevitable results—confusion and unfair competition.

Mary Martin of San Francisco, had employed defendant's moving services. Regarding a particular complaint she testified (R. 268-9) as follows:

> "Q. And did you have reason to complain about that particular movement that they handled for you?
>
> A. Yes, I did, for the simple reason that—
>
> Q. Well, just answer the question first. You did have some reason to complain?
>
> A. Yes.
>
> Q. And what did you do and where did you call with respect to that complaint?
>
> A. I called—I looked in the telephone book under National, and I called San Francisco, thinking that would be the head office, and they informed me that they didn't have—
>
> Q. Who did you call?
>
> A. National Van.
>
> Q. You know that you are saying National Van and not National Transfer?
>
> A. Yes.
>
> Q. All right. Proceed, please.
>
> A. And I assumed that National—I should have taken more time to look on the papers that and called National Transfer, but National—I called National Van in the telephone book."

She went on to tell that she asked for a Mr. Green (defendant's employee in San Francisco) and that she was told by the person answering the telephone that Mr. Green was with National Storage (defendant).

Harold T. Moss of Chicago, a competitor, testified that a van drove up to their warehouse to unload a shipment. He noticed the vertical stripes and thought it was plaintiff's van. Later he determined this was a mistake. The van was defendant's (R. 373-374). Specifically, he said:

> "Q. Where was it you saw this National Transfer & Storage mark?
>
> A. They backed into our warehouse to unload a shipment for storage or transit, and at the time they were backing in, I thought it was a National Van Lines truck.
>
> Q. What made you think so?
>
> A. On account of the emblem on it—this striped affair."

Russell Minear testified (R. 111, 112) after he was shown an exhibit displaying defendant's mark and asked whether he ever saw it he answered:

> "A. Yes.
>
> Q. Where was the first time you remember seeing this particular insignia?
>
> A. San Diego, California.
>
> Q. On what?
>
> A. On a building.
>
> Q. What was your reaction when you saw that?
>
> A. I thought it was National Van Lines. * * *
>
> Q. Did you do anything after seeing that?
>
> A. The next time I saw Mr. McKee I mentioned that he had quite a place in San Diego along the highway.
>
> Q. What did he say?

A. He said, "That is not mine. It belongs to my competitor."

George W. Healey, another of plaintiff's witnesses, in testifying about the significance of the vertical stripes in identifying plaintiff, said, when asked if he had ever seen that insignia (R. 119):

"A. Yes, I have.

Q. Do you remember the first time you saw it?

A. Yes, I do; approximately a year ago.

Q. Where?

A. At my warehouse.

Q. In?

A. Los Angeles.

Q. On what sort of thing was it when you saw it?

A. It was on a moving van.

Q. What was your reaction when you saw it?

A. Well, I went to examine it rather closely, because of the similarity between what I knew to be the National Van Lines insignia.

Q. And what did you do, if anything?

A. I did nothing. I just checked it. Thereafter I looked twice when I saw it.

Q. What did you find—

The Court: Did it occur to you to be a National Van Lines sign?

The Witness: I thought it was at first.

"The Court: Then you examined it closely, and did you still think so?

The Witness: No, the name Dean Van Lines* was on it."

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*This was after commencement of this action when defendant used both names, Dean Van Lines and National Transfer & Storage.

Walter Bock, plaintiff's manager at its Los Angeles terminal, testified as to the confusion with defendant which occurred frequently (R. 121-122). He explained the confusion surrounding a contract for services with the Government. He had received the contract (Ex. 38), which was obviously intended for defendant. This contract was mailed to plaintiff. When asked what he did with it, he said:

> "A. Being it was Government property I mailed it to Fort MacArthur, with a letter advising them that:
>
> 'Returned herewith is a crating bid contract addressed to National Transfer & Storage Co., 124 N. Center Street, Los Angeles, California.
>
> 'As you will note, 124 N. Center Street was our previous location, prior to the removal of our offices to our present address in 1953.
>
> 'No doubt this bid was meant for National Transfer & Storage Co., as National Van Lines, Inc. has never applied for any crating contract.' "
>
> * * *

Mr. Bock testified that another instance of confusion which occurred just the day prior to the trial (R. 132-134) (Exs. 41-43). A letter had been received involving a claim by a Sergeant Wilson, of Biloxi, Mississippi. Correspondence about this had been directed by the sales agent to plaintiff's office. It had been received "by mistake" in defendant's Oakland office. Defendant's offices in turn transmitted it to plaintiff's Los Angeles office.

Mr. Bock testified about frequent instances of confusion.

Robert W. Adams, who was in charge of plaintiff's San Francisco office for several years, testified as to numerous instances of confusion and supplied considerable memoranda with respect thereto. (R. 274-357; Ex. 49).* First Mr. Adams explained about numerous telephone calls reach-

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* This deposition was supported by a series of exhibits A-R inclusive.

ing plaintiff's San Francisco office which were intended for defendant (R. 279-281). When asked how he knew that these calls were intended for defendant, he said:

> "A. When the people called in, either for a complaint or to check for service, we'd ask their name and find that, in checking our records, we had no order for them or had no record—of their name. Then in questioning the person who had called in, we would find that they were under the impression they were calling National Transfer & Storage."

Continuing, he said:

> "A. In many instances, they (customers) would—we would call National Transfer and ask them if they had records of such a shipment or customer, and they would say yes, and we would tell the party to get in touch with National Transfer or have National Transfer call the party direct."

When Mr. Adams was asked whether this happened frequently, he said:

> "A. Yes, it did.
>
> Q. And did that happen continuously until you left the employ of National Van, to your knowledge?
>
> A. Yes, it did.
>
> Q. And those occasions were always brought to your attention, or you were a party to the transactions?
>
> A. Yes, definitely.
>
> Q. And did you ever get calls from National Transfer at your office at National Van regarding any calls that they may have had for your office?
>
> The Witness: Once or twice."

Among the instances of confusion established by Mr. Adams there was the case of Mr. R. C. Allen (R. 282). He called and asked for Mr. Green, "who works for National

Transfer & Storage." Mr. Allen had sold defendant some cartons and was inquiring to see if they would like more.

Upon another occasion, Mr. Adams received a letter intended for defendant about the purchase of drums. He put in in another envelope and forwarded it to defendant (R. 283).

Mr. Adams also explained confusion involving Mrs. Reiss. She telephoned plaintiff's office about a crating contract which she had with defendant (R. 283).

Mr. Adams also explained about the confusion even amongst the competitors. Bekins Transfer Company, of Oakland, called plaintiff's office about a shipment that had been in storage at defendant's warehouse. It involved a claim from a customer which was directed to plaintiff but was really intended for defendant (R. 284).

These was also a case of confusion involving military personnel at Camp Stoneman. Mr. Adams received a call at plaintiff's office regarding a shipment which was being handled by defendant (R. 285).

There was another instance of confusion involving a Mrs. Higbee. She called plaintiff's office asking when her furniture would arrive. Mr. Adams had no record of the shipment and then called defendant's office and found that they were handling it (R. 286).

Another time a Mrs. Roddy called about delivery in San Francisco of a shipment that had been picked up in San Diego two weeks earlier. Again it was found that this was a shipment handled by defendant (R. 287).

A similar incident was reported regarding a Mrs. McDaniels, who had called plaintiff's office about cancelling an order for moving which she had placed with defendant. When Mr. Adams checked this, he discovered the error and told Mrs. McDaniels to get in touch with defendant (R. 287).

There were numerous additional incidents of confusion of the same nature explained by Mr. Adams. Attention is invited to that of a Captain Wild (R. 288), a Colonel Lightbody (R. 289), a Mr. Arnold (R. 289), and others. All involved calls to plaintiff's office which should have been directed to defendant.

Mr. Adams explained in detail an instance of a direct "palming off" by defendant. This is the Stokely Foods incident (R. 290-295). Because of its significance, extensive portions of this testimony are set forth below.*

The record shows further cases of confusion involving International Harvester Company (R. 295), Transport Clearings of San Francisco (R. 296), the Post Transportation Office from Camp Presidio in California (R. 297), and others.

Finally, in summarizing the actual cases of confusion,

---

*"A. Yes. This is in connection with a Mr. Hutto, and he was an employe of Stokely Foods, and the Stokely Foods were paying for his move, and the order had been placed by him through his traffic manager.

Q. The traffic manager of Stokely?

A. Yes, of Stokely Foods, and Stokely Foods' traffic manager told him to get in touch with Mr. Allen of National Van Lines, and Mr. Hutto, who lived in Hayward, called the National Transfer and asked for Mr. Allen, and he was told that Mr. Allen did not work there any longer, and he proceeded to place his order with them. Then, on the day of moving National Transfer's van was late, and—

Q. How did you know it was late?

A. We knew because he called his traffic manager to complain that the van was not there on the time that had been scheduled for, and—

Q. 'He' refers to the man at Stokely?

A. Mr. Hutto called the traffic manager of Stokely and the traffic manager at Stokely Foods told him to call Mr. Allen, and Mr. Hutto said that Mr. Allen was no longer with National.

Q. Were those facts related to you subsequently?

A. They were, definitely. And the traffic manager told Mr. Hutto that Mr. Allen was with National Van Lines, and gave him Mr. Allen's telephone number, which was, of course, National Van

it is significant that Mr. Dean himself admitted confusion. The following is a quotation from Mr. Dean's testimony (R. 242-243):

> "Q. But it is a fact your offices and probably you personally did receive some complaints that should have been directed to National Van Lines, the plaintiff?
>
> A. It is possible, yes.
>
> Q. You testified that they didn't, didn't you?
>
> A. I said in one area we had some specific—or they were called specifically to my attention. That was in the Monterey area."

As the record shows, defendant, after this suit was filed, began using "Dean Van Lines," with the vertical stripes, in place of "National Transfer & Storage Co." with ver-

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Lines' phone number here in San Francisco, and Mr. Hutto called in, and it was through that telephone call that we got all of this information in connection with the confusion that he had experienced, and through talking with him—he found that he had gone to the wrong company—we found that he'd actually been trying to get in touch with us to place his order.

* * *

"Q. Was it a regular account of National Van Lines?

A. Yes, it was. And in any case, Mr. Hutto asked if we could have a van over there, which we checked and found that we could and told him we would have one over there within two hours, and he said he was to move with National Van Lines, and he would like to have us come over and pick up his goods as soon as possible, which we did, and he in turn called National Transfer & Storage and cancelled the order with them.

Q. Who had really placed the order for Mr. Hutto; was it the traffic manager of Stokely?

A. The traffic manager of Stokely told Mr. Hutto to contact Mr. Allen. You see, Mr. Allen called on the traffic manager of Stokely frequently and—

Q. Mr. Allen was in your employ, or with National Van Lines?

A. That's right."

Q. How did Mr. Hutto come finally to get the proper number of Mr. Allen?

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tical stripes. In explaining this "litigation maneuver," he released an announcement to the trade (R. 438-439). Regarding the use of his name, Dean, he said in part to the trade: "* * * we have experienced difficulties from time to time, due to confusion of similar names."

It is believed that this summary of the confusion evidence demonstrates the need for complete injunctive relief. Notwithstanding this overwhelming evidence of actual confusion, attention is invited to the time-honored rule that it is not necessary for plaintiff to show actual confusion. *Mere likelihood of confusion warrants relief.* In the recent case of *Admiral* v. *Penco,* 203 F. 2d 517 (CCA2), the Court at page 520 summarized the oft-quoted rule thus:

> "* * * It is not necessary to show actual cases of deception or confusion since the test is the likelihood of confusion. * * *"

To the same effect see:

J. C. Penney Co. v. *H. D. Lee Mercantile Co.,* 120 F. 2d 949 (CCA 8);

LaTouraine Coffee Co. v. *Lorraine Coffee Co.,* 157 F. 2d 115 (CCA 2);

McLean v. *Fleming,* 96 U.S. 245;

Harry D. Nims, Unfair Competition and Trade Marks, Vol. 2, pp. 1049, §335.

E. Defendant Cannot Justify His Own Infringement by Showing Use of Similar Marks by Strangers

Defendant relies heavily upon the alleged fact that others have used NATIONAL extensively as a mark and that the vertical stripe design has been in common use by

others in various fields. Attention is invited to the fact that most of the so-called "other uses" involve unrelated businesses. Significant also is the fact that defendant does not show use by others of the *composite* mark comprising NATIONAL *with* vertical stripes in the moving business or in any other business. In fact, one of defendant's own witnesses was asked on cross examination (R. 258):

> "Q. You don't know of anyone that uses 'National' and the vertical stripe design, beside the plaintiff and the defendant?
>
> A. No."

Defendant, in order to advance his theory that NATIONAL with vertical stripes is in the public domain, is forced to dissect the composite mark and to consider the two elements separately. This fact is another striking weakness in defendant's position. The defense of third party uses is entirely untenable as it is predicated upon the false premise that two wrongs make a right. The fact that others may also be infringing can in no wise justify this defendant's wrong.

In *Admiral* v. *Penco,* 203 F. 2d 517 (C.C.A. 2), the court passed on this identical issue and said at page 521:

> "* * * On the other hand, the various Admiral trademarks issued to others, upon which defendant relies to show a nonexclusive right in plaintiff, applied to entirely different types of commodities: automotive products and motor fuels; alcoholic beverages; food, clothing, and fabrics; and various miscellaneous products ranging from anchors to smoking tobacco and bicycles. *Moreover, as plaintiff says, these are mere third-party uses, perhaps substantially or wholly wrongful and inadequate to justify defendant's wrongful use. Ward Baking Co.* v. *Potter-Wrightington,* 298 F. 398, 402 (C.C.A. 1); *Bond Stores, Incorporated* v.

Bond Stores, Inc., 104 F. 2d 124, 125 (C.C.A. 3) * * *"
(Emphasis supplied)

The Bond case referred to in the Penco decision is considered to be particularly apt. The court there held:

> "The industry of counsel has brought to our attention a long list of corporations which have the word 'Bond' in their corporate names. This list could doubtless be indefinitely lengthened. A wrong done to the plaintiff however cannot be condoned by like wrongs done by others."

In *S. C. Johnson & Son, Inc.* v. *Johnson,* 28 F. Supp. 744 (D.C.W.D. N.Y. 1939), the same question was considered, and the court said at page 747:

> "Many registrations of the name 'Johnson's' have been introduced by defendant to show the widespread use of the name on products of many descriptions. Even were such others using the name on identical products, such fact could not avail defendant if plaintiff has been wronged by his action. * * *"

The Court of Customs and Patent Appeals in *Weyenberg Shoe Mfg. Co.* v. *Hood Rubber Co.,* 49 F. 2d 1046, at page 1048, held, as a result of an action growing out of an opposition proceeding where the defendants attempted to show "other registrations," that:

> "* * * If a confused situation already exists, that should not be held to justify an act which would confuse still further. * * *"

As recently as February 23, 1956, the Commissioner of Patents in *General Shoe Corporation* v. *Lerner Brothers, Inc.,* 108 U.S.P.Q. 341, passed on the same question where respondent urged restriction of the rights to the mark "Holiday" on the basis that it had been widely used. In dismissing this contention the Commissioner said:

> "A later user may not employ the action of strangers to a proceeding as a shield for his own actions when the facts in the proceeding are such as to support a conclusion of likelihood of confusion."

Of particular significance on this point is the recent holding by this court in *National Lead Company* v. *Wolfe,* 223 F. 2d 195 (C.C.A. 9). In dismissing defendant's contention that others had also used "Dutch" as a mark, the court said:

> "It may be that some of these third persons may also have been guilty of wrongful infringement, but such would not be a defense or justification for the appellees. It is no excuse then to say that others have been guilty of the same wrong." (Citing authorities).

These authorities clearly demonstrate that the evidence of alleged third party uses offered by defendant is wholly inadmissible and completely lacking in probative value. Based on the fundamental principles of law cited, plaintiff objected to admission of defendant's Exhibits C through Z and AA through HH and also the depositions of Abraham Mechanic and M. P. Pihl. A cursory examination of the record shows that a good portion of the testimony and the bulk of exhibits offered by defendant are directed to these alleged "third party" uses. During the trial, plaintiff objected emphatically to the admission of all this evidence. However, ruling was withheld (R. 202-206, 209-214, 230, 444).

Attention is also invited to the fact that notwithstanding the voluminous evidence submitted by defendant as to alleged "third party" uses, all subject to objections, the court failed to rule on this evidence; consequently it must be assumed that all this evidence was improperly admited and considered. Plaintiff urges that this action by the lower court was clearly erroneous in view of the well established principles of law set forth in the citations.

F. Such Rights as Defendant Had to Use "NATIONAL" Terminated Upon Cancellation of the Agency License

The agency agreement between the parties was entered into and continued in force from its inception on November 7, 1944 to February 20, 1950.

The agreement provided that the agent (defendant) at termination of the agreement should cease using the principal's (plaintiff's) names "* * * in any manner whatsoever." Use of "Company insignia" was definitely prohibited after termination, and defendant agreed "not to misrepresent." Even in the absence of such clear provisions, the law is explicit that defendant's right to use the mark in issue ended upon termination of the license.

In *Joseph Laurer Brewing Co.* v. *Ehresmann,* **111 N.Y.** Supp. 266, plaintiff leased to defendant its bottling business of "Laurer Beer." Defendant engaged in the business and sold the beer under the name "Laurer Beer Bottling Co." with plaintiff's knowledge and consent. There was no provision in the lease, contract or bill of sale as to the use of the name. The court held that defendant did not acquire a permanent right to use the name and had *nothing but a license to use it during the lease.*

In the case of *Nelson* v. *J. H. Winchell Co.,* 89 N. E. 180, the court held that where one received a temporary license to use a trademark of another and used it after the expiration of the license and after notice from the owner not to do so and warning that he would be held responsible for further use, he was guilty of wrongfully using the trademark and was liable for the profits realized thereby, though he acted on advice of counsel not informed of the temporary license.

Similarly, in the case of *Elliott Varnish Co.* v. *Sears, Roebuck & Co.,* 221 F. 797, the court held where complain-

ant, selling paint under the trademark ROOF LEAK, contracted for a sale of its product under the name of NEVER LEAK, by defendant, a mail order house, defendant's right to use the words NEVER LEAK did not outlast the contract, which had no further operation from the time it ceased to order complainant's product.

In *Morand Bros., Inc.* v. *Chippewa Springs Corporation,* 2 F. 2d 237, the facts show that for a period of years Morand Bros. were distributors of CHIPPEWA Spring Water in Chicago. Distributorship was by contract. The court held that use of the mark CHIPPEWA on other water after the termination of the distributorship contract by distributor was an infringement of the owner's rights.

In *United States Ozone Co. et al.* v. *United States Ozone Co. of America,* 62 F. 2d 881, the court held that the right of a sales agent, having exclusive selling rights in a certain territory, to use the manufacturer's trademark and trade name, ends with the contract.

Again, in *Lawrence-Williams Co.* v. *Société Enfants Gombault et Cie,* 22 F. 2d 512, the court held that one who, for many years, as exclusive selling agent for another, sold the product of the latter under his marks, does not acquire a right to use such marks upon the termination of the agency, either on the same or a different product. To the same effect see *Progressive Welder Co.* v. *Collom,* 103 U.S.P.Q. 267.

There is no reasonable basis upon which is disputed the fact that an agent must discontinue use of his principal's name upon termination of the agency agreement. Here, however, the case against defendant is stronger than usual as defendant did not only continue using "NATIONAL" after termination, but just about the time that he discontinued the agency relationship, defendant also adopted the vertical stripes to make a composite mark which completely

simulated plaintiff's. Since defendant did not use the vertical stripe design except as he used plaintiff's advertising material, until he severed relations with plaintiff, there can be but one logical inference—calculated copying.

G. There Should Be an Accounting for Profits and Damages and Recovery of Attorneys' Fees and Expenses

Under the doctrine announced in the Second Circuit in *Admiral* v. *Penco,* 205 F. 2nd 515, plaintiff, during the trial attempted to introduce evidence as to defendant's sales and the like. This was refused by the lower court at that time (R. 108-109).

Plaintiff urges that under the provisions of 15 U.S.C.A. 1117 and the authorities construing it in this circuit, it should be awarded an accounting to establish damages and profits. *North American Systems, Inc.* v. *North American Aviation Inc.,* supra; *National Lead Co.* v. *Wolfe,* supra.

Because defendant's acts were wilful and obviously calculated to trade upon plaintiff's good will, it is urged that there should also be a recovery of attorneys' fees and expenses in addition to usual court costs.

Franz v. *Buter,* 38 F. 2d 605.

Aladdin Mfg. Co. v. *Mantle,* 116 F. 2d 708.

Admiral v. *Penco, supra.*

Keller Products Inc. v. *Rubber Linings Corp.,* 213 F. 2d 382.

VI. CONCLUSION.

It is urged that the lower Court was clearly in error when it dismissed the complaint, especially when it failed to recognize plaintiff's significant registered trademark

rights. It particularly erred in failing to find that defendant's acts caused considerable confusion and that there is a strong likelihood of continued confusion.

Respectfully,

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38 South Dearborn Street
Chicago, Illinois
Attorneys for Appellant

Chicago, Illinois
March 28, 1956

stered Sept. 11, 1951

Registration No. 548,0180

PRINCIPAL REGISTER
Service Mark

UNITED STATES PATENT OFFICE

National Van Lines, Inc., Chicago, Ill.

Act of 1946

Application May 17, 1948, Serial No. 557,202

STATEMENT

ɔnal Van Lines, Inc., a corporation duly ɛed under the laws of the State of Illinois, at Chicago and doing business at 2431 Park Road, has adopted and is using the mark shown in the accompanying draw- r TRANSPORTATION OF GOODS BY R VAN, in Class 105, Transportation and , and presents herewith five specimens g the service mark as actually used in con- with the sale or advertising of such serv- ıe service mark being used as follows: on es of the trucks used in moving goods; on sing literature; on business cards; and ɛr heads and envelopes, and requests that the same be registered in the United States Patent Office on the Principal Register in accordance with the act of July 5, 1946. No claim is made to the words "Nation Wide" and "Van Lines Inc." apart from the mark as shown.

The service mark was first used on July 21, 1934, and first used in the sale or advertising of services and the services rendered in commerce among the several States which may lawfully be regulated by Congress on July 21, 1934.

NATIONAL VAN LINES, INC.,
By FRANK L. McKEE,
President.

PLAINTIFF'S EXHIBIT NO. 1

gistered Sept. 9, 1952

Registration No. 563,950

PRINCIPAL REGISTER
Service Mark

UNITED STATES PATENT OFFICE

National Van Lines, Inc., Chicago, Ill.

Act of 1946

Application January 4, 1952, Serial No. 623,200

NATIONAL VAN LINES INC.

STATEMENT

tional Van Lines, Inc., a corporation duly nized under the laws of the State of Illinois, ed at Chicago and doing business at 2431 g Park Road, has adopted and is using the ce mark shown in the accompanying draw- for the TRANSPORTATION OF GOODS BY OR VAN, in Class 105, Trasnportation and ge, and presents herewith five specimens ing the service mark as actually used in con- on with the sale or advertising of such serv- the service mark being used as follows: on ides of the trucks used in moving goods; on tising literature; on business cards; and on heads and envelopes, and requests that the be registered in the United States Patent on the Principal Register in accordance section 2(f) of the act of July 5, 1946.

plicant disclaims exclusive use of the words Lines, Inc." apart from the mark as shown.

tional Van Lines, Inc., is the owner of Reg- d Service Mark 548,018, registered Septem- 1, 1951, on the Principal Register of the d States Patent Office.

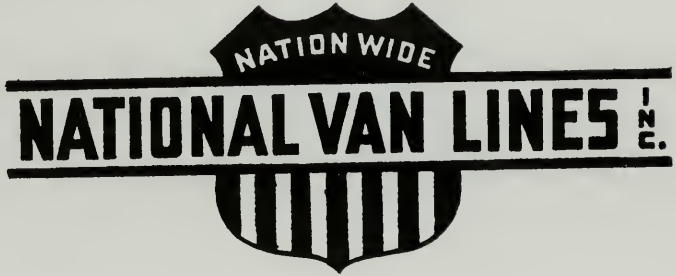
The service mark was first used by applicant's predecessor in title on or about October 1928, and first used by applicant on June 21, 1934, and first used in the sale or advertising of services and the services rendered in commerce among the several States which may lawfully be regulated by Congress by applicant's predecessor in title on or about October 1928, and by applicant on June 21, 1934.

The mark is claimed to have become distinctive of the applicant's services in commerce which may lawfully be regulated by Congress through substantially exclusive and continuous use thereof as a mark by the applicant in commerce among the several States which may lawfully be regulated by Congress for the five years next preceding the date of the filing of this application.

NATIONAL VAN LINES, INC.,
By FRANK L. McKEE,
President.

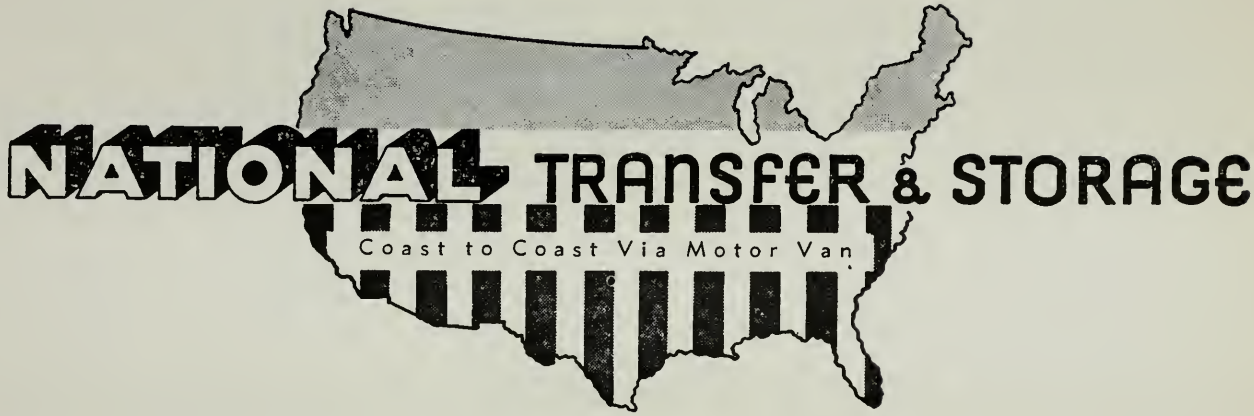
PLAINTIFF'S EXHIBIT NO. 2

PLAINTIFF'S MARK



(From Plaintiff's Exhibit 7 A)

DEFENDANT'S MARK

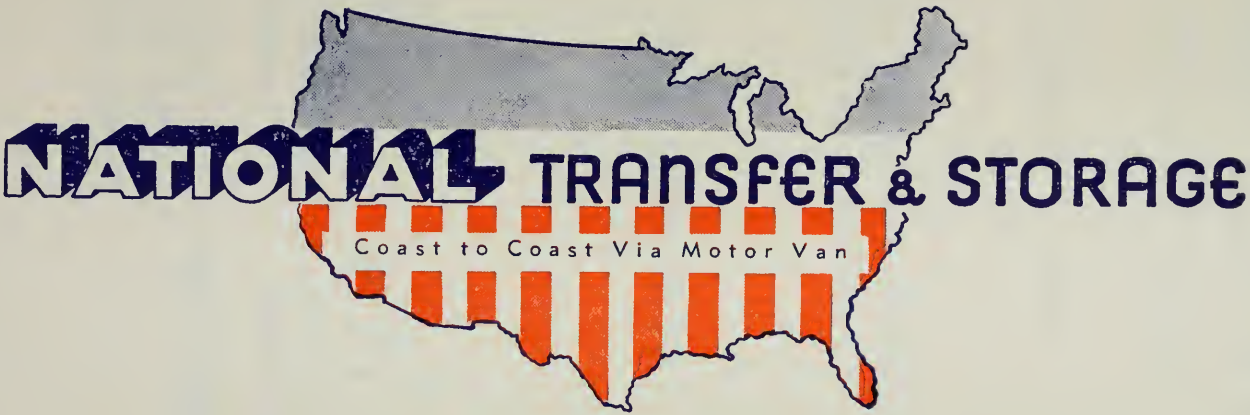


(From Plaintiff's Exhibit 1)

PLAINTIFF'S MARK

(From Plaintiff's Exhibit 7 A)

DEFENDANT'S MARK



(From Plaintiff's Exhibit 1)

No. 14975.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL VAN LINES, a corporation,

Appellant,

vs.

ALFRED E. DEAN, trading under the firm name of NATIONAL TRANSFER & STORAGE CO.,

Appellee.

APPELLEE'S BRIEF.

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No. 14975.

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vs.

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Appellee.

APPELLEE'S BRIEF.

I.
JURISDICTION.

Appellee concedes that appellant's statement of jurisdiction is correct.

II.
QUESTION PRESENTED.

The question presented by this appeal is simply whether or not the trial court's findings of fact [R. 52] are "clearly erroneous" within the meaning of Rule 52(a), Federal Rules of Civil Procedure.

III.
STATEMENT OF CASE.

Appellant's complaint [R. 3] charges service mark infringement, unfair competition and violation of contract, all of which charges are denied by appellee's first amended answer [R. 36].

After hearing the evidence, the trial court rendered judgment [R. 61] dismissing the complaint, and made complete findings of fact [R. 52], which appellee submits, fully support the judgment upon each of several grounds and the evidence supports the findings.

In 1951, appellant registered its descriptive trade-name, "National Van Lines, Inc." as a service mark, in conjunction with an insignia in the form of a close simulation of the shield of the United States [Registration 548,018, Ex. 3a]. In 1952, appellant again registered said trade-name, without the insignia, as a service mark [Registration 563,950, Ex. 4a].

Appellant's president admitted [R. 172] *and its counsel conceded, at the trial* [R. 165], *that appellant uses "National" in its name merely as a geographically descriptive adjective to denote the national scope of its operations.*

The evidence shows the acts of the parties leading up to this litigation to be as follows:

On November 7, 1944, appellant and appellee entered into the contract in suit, Exhibit 5, pursuant to which appellee, in addition to carrying on his own independent transfer business under his own trade-name, undertook to book interstate shipments to be handled by appellant. When appellee entered into the contract, his trade-name was National Van & Storage Co., in which name he

signed the contract. In the contract, the only restriction as to the trade-name under which appellee would carry on his own business during and after the contract was that he would not use in it any of the following *combinations* of words: "National Van," "National Van Lines," or "National Van Lines, Inc." To conform to this provision of the contract, appellee, in good faith, immediately changed his trade-name from "National Van & Storage Co.," to "National Transfer & Storage Co." [R. 220], which he did with appellant's knowledge and consent [R. 181].

Appellee continued to use the latter name until he voluntarily changed it, in 1953, to "Dean Van Lines" [R. 220-221; Ex. KK].

In 1949, appellee designed and adopted a trade symbol in the form of a striped outline map of the United States [R. 220].

The contract, Exhibit 5, was terminated in February, 1950.

Not until November, 1951, did appellant in any way indicate to appellee that it objected to appellee's use of the trade-name "National Transfer & Storage Co." [R. 226], which name appellee had then been using continuously since November, 1944, *with appellant's full knowledge and acquiescence* [R. 181], during which time appellee built up his business from a 4-van business to an 83-van business [R. 223].

This action was not filed until a year later, in November, 1952.

The evidence shows that, since at least 14 years before appellant commenced business, it has been common prac-

tice for various transfer companies doing a national business to use the word "national" as a geographically descriptive prefix to their trade-names to so describe the scope of their operations [Exs. E-Q]. In fact, at least one of those transfer companies, operating its vans in interstate commerce out of Milwaukee, Wisconsin, has continuously used the precise name "National Van Lines" since a time at least four years before appellant adopted the name in 1934 [Exs. E, F, G; R. 443], thus showing that appellant was not the first to adopt and use the name "National Van Lines."

The evidence also shows that it has been common practice, since at least fifteen years before appellant entered the field, for transfer companies to display on their vans a simulation of the shield of the United States [Exs. R-HH].

Appellant's brief states that appellant did considerable advertising which was used by appellee during the contract. This is contrary to the evidence, which shows that appellant did not commence advertising until *after the contract was terminated and until after the complaint was filed* [R. 190-195]. The evidence also shows that the only so-called advertising matter supplied to appellee by appellant was a "sticker," to be posted in appellee's office, stating that appellee was authorized to book interstate shipments for appellant [R. 219].

The complaint contains no allegation of "secondary meaning" and the evidence does not establish any [Finding 15, R. 56].

From appellant's brief and "specification of errors," it appears that appellant relies upon its charges of infringement of registered alleged service marks and alleged contract violation.

IV.
SUMMARY OF ARGUMENT.

The names used by appellant and appellee are entirely different except that both use the prefix "National" as a geographically descriptive adjective to describe the scope of their operations.

Moreover, it has been common practice by various transfer companies since times long before either appellant or appellee entered the field, to use "national" in the same manner and for the same purpose, so that the public has come to recognize that it must carefully scrutinize the entire names of the users of said prefix if it cares with which user it wants to deal.

The same is true with respect to the use of insignia simulating the shield of the United States, which, under the law, cannot be monopolized by any one as part of a trademark.

The law is well settled that, in the absence of fraud, there is no trademark infringement or unfair competition where the only similarity between the composite names in issue is the descriptive use of a geographical adjective which any one may use with equal truth and right.

This case is clearly distinguished from those cases cited by appellant, in which the courts have sustained descriptive or geographical words as trademarks *where they are not used in a descriptive sense, or where they have acquired a secondary meaning.*

In an attempt to overcome the admitted and obvious fact that appellant uses "National" only in the sense of a geographical adjective, and in an attempt to overcome

the statutory provision that a simulation of the flag, coat of arms or other insignia of the United States may not validly constitute a part of a trademark, appellant's argument proceeds upon the erroneous hypothesis that its alleged service mark consists merely of "National with stripes." Such a hypothesis is directly contrary to the evidence.

The striped map symbol used by appellee is clearly distinguishable from the shield used by appellant.

While, in the absence of infringement, it was unnecessary for the trial court specifically to include in its judgment a ruling upon the validity or invalidity of appellant's alleged service marks, the evidence and findings show them to be invalid, not only because of their descriptiveness, but also because appellant has never been the owner of the name "National Van Lines."

Since appellee has never used either of the word *combinations* "National Van," "National Van Lines," or "National Van Lines, Inc." in its trade-name, and has not used any symbol resembling the shield of the United States, appellee has not violated any provision of the contract in suit.

In any event, appellant is estopped to assert this action by virtue of its laches in failing to complain about the name which appellee was using for a period of over seven years, during all of which time appellant was fully aware that appellee was using the name "National Transfer & Storage Company" and was continuously building up his business under that name. Appellant's brief and "specification of errors" are silent upon this defense and the findings of fact which support it.

V.
ARGUMENT.

A. Unless "Clearly Erroneous," the Trial Court's Findings of Fact Will Not Be Disturbed on Appeal.

Findings upon issues of alleged trademark, infringement, unfair competition, contract violation and laches are determinations of fact which should not be upset on appeal unless they are "clearly erroneous."

Federal Rules of Civil Procedure, Rule 52(a):

Graver Tank and Mfg. Co. v. Linde Air Products, 339 U. S. 605, 609-611, 70 S. Ct. 854, 94 L. Ed. 1097;

Jacuzzi v. Berkeley Pump Co., 191 F. 2d 632, 634 (C. A. 9, 1951);

Patterson-Ballagh Corp. v. Moss, 201 F. 2d 403 (C. A. 9, 1953);

Leishman v. General Motors, 191 F. 2d 522 (C. A. 9, 1951), cert. den. 342 U. S. 943.

B. Appellant and Appellee Use the Word "National" in Their Otherwise Different Descriptive Names Merely in the Sense of a Geographical Adjective to Describe the Scope of Their Operations. [Findings 7, 11, 13, 15, 17, 19, 20, 21 and 23.]

The facts of this case clearly distinguish it from those involved in *National Lead Co. v. Wolfe,* 223 F. 2d 195, and other cases cited by appellant, in which latter cases the descriptive word involved was not being used in a descriptive sense, and are also distinguished from those involved in *North American Air Coach v. North American Aviation,* 107 U. S. P. Q. 68, and other "secondary meaning" cases cited by appellant, in which the geograph-

ical name involved had acquired a "secondary meaning." Neither of those conditions is here involved.

Finding 7 [R. 54], reads as follows:

> "7. Plaintiff adopted and has used the prefix 'national' in its name in the sense of a geographical adjective to denote that its van line is operated upon a national scale, and plaintiff's composite name 'National Van Lines, Inc.' is merely descriptive, denoting that plaintiff is a corporation operating a nationwide van line service."

In addition to the obviously descriptive nature of the phrase "National Van Lines, Inc.", this finding is based upon the admission of appellant's president as follows [R. 172]:

> "Q. Do you think the word has some connotation that you are able to go everywhere and deliver goods on a national scale? A. Yes; this gives it a far more descriptive name than 'Allied.' That just means a grouping of van lines, but National Van Lines means national in scope."

In fact, appellant's counsel made the following concession during the trial [R. 165]:

> "The Court: You feel that 'National' is not descriptive?
>
> Mr. Groen: For this specific business it is descriptive, in a sense, of national work, but we are talking about a specific service of household moving and storage."

Appellant's counsel attempt to minimize the importance of his admission by claiming that the mark was not descriptive of "a specific service of household moving and storage" must fail, however, because it is just as descrip-

tive of the moving of household goods on a national scale as it is of moving any other goods on such a scale, and an examination of appellant's trademark registrations, Exhibits 3a and 4a, shows that both specifically describe the services for which the marks were registered as being *"transportation of goods by van,"* not just household goods.

C. The Law Is Well Settled That All Traders Have an Equal Right to Use Geographical Terms as Descriptive Adjectives in Their Business Names to Describe the Geographical Scope of Their Activities.

The courts have consistently held that geographical adjectives and other descriptive words, when used as such, cannot be monopolized as parts of trademarks. This fundamental principle of the law of trademarks and unfair competition has been repeatedly upheld by the United States Supreme Court in:

Canal Co. v. Clark, 80 U. S. 311, 324, 20 L. Ed 581;

Columbia Mill Co. v. Alcorn, 150 U. S. 460, 37 L. Ed. 1144;

Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665, 45 L. Ed. 365;

American Steel Foundries v. Robertson, 269 U. S. 372, 70 L. Ed. 317, 322,

and by our other courts in cases of which the following are typical:

> "We think that the word 'Continental,' a geographical adjective, meaning pertaining to or relating to a continent, is a word in common use, more or less descriptive of extent, region, and character,

and, like the words 'Columbian,' 'International,' 'East Indian,' and some other geographical adjectives, it cannot be exclusively appropriated as a trademark or trade-name. See Mill Co. v. Alcorn, 150 U. S. 460, 466, 14 Sup. Ct. 151, 37 L. Ed. 1144."

Continental Insurance Co. v. Continental Fire Association, 101 Fed. 255, 257 (5th Cir.).

"Geographical terms and words descriptive of the character, quality, or place of manufacture of an article are not capable of monopolization as a trademark. To entitle a person to the protection in the use of a name as a trademark his right to use it must be exclusive, and not a name which others may employ with as much truth as he who uses it."

American Wine Co. v. Kohlman, 158 Fed. 830.

See also:

Columbia Mill Co. v. Alcorn, 150 U. S. 460, 463;

Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446;

Pulitzer Pub. Co. v. Houston Printing Co., 11 F. 2d 834 (5th Cir.).

Appellant, in its brief, cites *S. C. Johnson & Son, Inc. v. Johnson,* 28 Fed. Supp. 744, as an instance in which the courts restrained a defendant from using his surname "Johnson." Appellant's citation, however, fails to mention that on appeal, 116 F. 2d 427, the decision was modified to allow the defendant to use his surname "Johnson," provided he distinguished it in some way by using it in conjunction with the word "cleaner."

D. Where Business Names Employ Descriptive Prefixes in Their Descriptive Sense, the Composite Names Are Sufficiently Distinguished if They Differ in Other Respects.

A review of the cases shows that where litigating parties are using geographical adjectives or other descriptive words as prefixes to their business names, there will be no restraint if the composite names, in respects other than the common use of the descriptive adjective, differ from each other.

For instance, in *Standard Accident Insurance Co. v. Standard Surety & Casualty Co.,* 53 F. 2d 119, the court held those two names to be sufficiently distinguished, considering the descriptive nature of the prefix "Standard."

In *Dunston v. Los Angeles Van & Storage Co.,* 165 Cal. 89, the court sustained defendant's right to use the generic name "Los Angeles Van & Storage Company" when plaintiff's name was "Los Angeles Truck & Storage Company."

Thus, in using the name "National Transfer & Storage Company," appellee has adequately distinguished over appellant's composite name "National Van Lines, Inc.", when it is considered that the only common word in the names is the geographical adjective "National."

E. A Descriptive Word May Not Constitute the Dominant Part of a Trademark.

Appellant's assertion that "National" is the dominant part of its alleged service mark, is without merit because a descriptive word cannot constitute the dominant part of a trademark.

Nestle's Milk Products v. Baker Importing Co., 182 F. 2d 193, 196.

F. **"National" Has Been So Commonly Used by Various Transfer Companies in Their Business Names to Denote the Geographical Scope of Their Activities, That the Public Has Come to Know That It Must Scrutinize Their Names in Their Entireties to Distinguish Them.** [Findings 6 and 13.]

Appellant's trademark registration 548,018, Exhibit 3a, recites that the name "National Van Lines, Inc." was first used by appellant on July 21, 1934* and appellant's registration 536,950, Exhibit 4a, recites that the name "National Van Lines, Inc." was first used by appellant on June 21, 1934.

The evidence shows that among the various other transfer companies using "National" as a geographical prefix in their business names are:

National Van Lines (of Milwaukee, Wisc.) [Exs. D-F; R. 399, 443].

National Moving and Warehouse Corporation [Ex. J].

National Movers, Inc. [Ex. M].

National Transfer & Storage Co. (of Sacramento, Calif.) [R. 187].

National Transfer, Inc. [Ex. H].

National Trucking Company [Ex. P].

National Transportation Company [Ex. I].

---

*Although this registration recites that the name "National Van Lines, Inc." was first used in October 1928 by a "predecessor in title", this is contrary to the evidence. What this refers to is an earlier company by the name "National Shippers and Movers" which never used the name "National Van Lines" [R. 163] and from which appellant bought one or two trucks. However, appellant was unable to produce any evidence of any transfer of business and good will of said "National Shippers and Movers" to appellant [R. 152-160].

National Freight Lines [Ex. Q].
National Freight, Inc. [Ex. O].
National Cartage Co. [Ex. N].
National Carloading Corporation [Ex. K].
National Trailer Convoy [Ex. L].
National Delivery Company [R. 396].
National Movers of Boston [R. 377].
National Movers of New York [R. 377].

Many of those transfer companies were operating under their said names long before appellant's entry into the field.

G. The Trial Court Properly Received Evidence of the Common Use of the Word "National" and of Simulations of the Shield of the United States.

Appellant argues that the trial court erred in admitting evidence of the common use of "National" as a geographical prefix as well as the common use of the shield of the United States. However, the courts have generally held it to be proper in a trademark case to admit evidence showing the weak, or descriptive strong nature of the mark in issue because the likelihood or unlikelihood of confusion depends upon the character of the mark.

PH. Schneider Brewing Co. v. Century Distilling Co., 107 F. 2d 699 (10th Cir.);

Sunbeam Lighting Company v. Sunbeam Corporation, 183 F. 2d 969 (9th Cir.);

Treager v. Gordon-Allen Ltd., 71 F. 2d 766 (9th Cir.);

American Steel Foundries v. Robertson, 70 L. Ed 317, 322;

Philco Corporation v. F & B Mfg. Co., 170 F. 2d 958 (7th Cir.);

Majestic Mfg. Co. v. Majestic Electric Appliance Co., 172 F. 2d 862 (6th Cir.);

Arrow Distilleries, Inc. v. Globe Brewing Co., 117 F. 2d 347 (4th Cir.);

France Milling Co. v. Washburn-Crosby Co., 7 F. 2d 304 (2nd Cir.);

Dwinell-Wright Co. v. National Fruit Product Co., 140 F. 2d 618 (1st Cir.).

It is also common for transfer companies to display upon their vans simulations of the shield of the United States [Finding 14]. Appellant was not the first to use a simulation of the shield of the United States nor is it by any means the only one using such a shield. The evidence shows that, since 1919, such a shield has been used by a transfer company operating in interstate commerce on the West Coast [Ex. P] and the same shield for many years has been used by All American Van & Storage Company [Ex. W]; All American Storage Company [Exs. X and Y]; Brugger Transfer & Storage Company [Ex. C], all on the West Coast.

H. Appellant May Not Monopolize a Simulation of Insignia of the United States as Part of Its Alleged Service Mark.

Such an insignia does not denote origin, but is merely tantamount to a statement that the user is a United States concern, and all United States concerns have an equal right to use such insignia.

The trademark act (15 U. S. C. 1052) expressly provides that a trademark may *not,*

> "consist of or comprise the flag or coat of arms or other insignia of the United States or of any state

or municipality, or of any foreign nation, or any simulation thereof."

The facts of this case clearly distinguish it over those involved in *Barbasol Co. v. Jacobs,* 160 F. 2d 336, cited by appellant. In the latter case the court sustained a trademark consisting of lines or stripes arranged in a *unique and distinctive pattern,* not merely in simulation of the well known shield of the United States.

I. Appellant's Alleged Service Marks Are Invalid. [Findings 6-15.]

Since there is no infringement, it was unnecessary for the trial court, in its judgment, specifically to rule upon the validity or invalidity of appellant's alleged service marks. However, it is submitted that the facts which the court found to exist clearly show the alleged marks to be invalid, not only because they are purely descriptive, but also because appellant is not and never has been the owner of the name "National Van Lines" and has no right to monopolize the shield of the United States.

As pointed out hereinbefore, if the name "National Van Lines" is owned by anybody, it is owned by said National Van Lines of Milwaukee, Wisconsin, which was the first to adopt and use it in the transfer business.

Federal registration does not create a trademark—the right comes from priority of use, not registration.

> "Federal registration does not create a trademark. The trademark comes from use, not registration, and the right to it is in the nature of a property right based on common law."
>
> *Campbell Soup Company v. Armour & Company,* 175 F. 2d 795 (3rd Cir.).

Only the owner of a trademark may validly register it and, to be the owner, one must be the first to adopt and use it.

> "The exclusive right to the use of the mark or device claimed as a trademark is founded upon priority of appropriation; that is to say, the claimant of the trademark must be the first to use or employ the same on like articles of production."
>
> *Columbia Mill Co. v. Alcorn,* 150 U. S. 460, 463.

As pointed out hereinbefore, geographical adjectives and other descriptive words, when used as such, may not be monopolized as trademarks, and simulations of the flag, coat of arms, or other insignia of the United States may not constitute part of a trademark.

J. Appellant's Alleged Service Mark Does Not Consist Merely of "National With Stripes." [Findings 7-11.]

In an attempt to escape the obvious and admitted fact that appellant uses "National" in an entirely descriptive sense, and that its alleged insignia is merely a close simulation of the shield of the United States, appellant, in its brief, repeatedly incorrectly characterizes its alleged mark as consisting merely of "National with stripes."

In this connection, it is interesting to examine the file wrappers [Exs. II and JJ], of the registrations of the alleged service marks in suit.

Exhibit JJ, the file wrapper of registration 563,950, shows that, when the application for registration was originally filed, appellant attempted to register merely the word "National," and the original drawing of the trademark submitted with the application showed only the word

"National." However, in its first action dated February 15, 1952, the Patent Office rejected the mark as submitted, saying:

> "The mark presented constitutes a *mutilation* of the mark used. The word 'National' forms *part* of applicant's trade name which is a *unitary term* and the specimens show the word 'National' only as a part of such term. As presented registration is refused."

Appellant responded to that rejection by submitting a new drawing showing the mark as "National Van Lines, Inc." and directed that it be substituted for the original drawing. With that drawing appellant stated:

> "The new drawing showing the service mark without mutilation is enclosed."

Therefore, appellant is now estopped to be heard to assert that the words "Van Lines, Inc." do not constitute an essential part of its composite mark.

Appellant has attempted to avoid this concession that its mark consists of the specific composite term "National Van Lines, Inc." and not merely "National," by claiming that appellant "disclaimed" the words "Van Lines, Inc."

What appellant fails to point out, however, is that it only disclaimed those words *"apart from the mark as shown,"* which means simply that, in order to register the composite mark, appellant had to disclaim any intention of monopolizing those words *except as a part* of its composite mark.

As shown by Exhibit JJ, in its first action on the application for registration, No. 563,950, the Patent Office required that appellant disclaim any intent to monopolize those purely descriptive words "Van Lines, Inc." except as an integral part of the composite term "National Van

Lines, Inc." In the first responsive amendment to that Patent Office action, appellant amended the application by adding the following thereto:

> "Applicant disclaims exclusive use of the words 'Van Lines, Inc.' *apart from the mark as shown.*"

An examination of Exhibit II, the file wrapper of registration 548,018, shows the same proceedings in the Patent Office. This is the registration which comprises the words "National Van Lines, Inc." with the shield upon which appear the words "nation wide."

In its first action on the application, the Patent Office required that the applicant disclaim any intention to monopolize the words "nation wide" and the words "Van Lines, Inc." *except as a part of the mark.* In its responsive amendment, directed that the application be amended by adding the following:

> "No claim is made to the words 'nation wide Van Lines, Inc. *apart fram the mark as shown.*'"

Those proceedings conclusively show, therefore, that in registration 563,950 the words "Van Lines, Inc." remain a necessary integral part of the composite mark, and that in registration 548,018, the words "nation wide" and "Van Lines, Inc." remain a necessary integral part of the composite mark. *Those words were not disclaimed as parts of the marks.*

K. The Evidence Does Not Establish Any Confusion.

To prove confusion one must produce witnesses who are accustomed to purchasing the goods or services upon which the trademark in issue is used.

> *Dwinell-Wright Co. v. National Fruit Product Co.,* 140 F. 2d 618 (1st Cir.).

In an attempt to prove some actual confusion, appellant produced several witnesses, only one of whom could be said to be disinterested, or a person who would be likely to seek the services of appellant or appellee. That witness was Mary Martin of San Francisco, California [R. 268], who was one of appellee's customers. She testified that one day when she was in a hurry she called appellant's office instead of appellee's office. However, she gratuitously admitted that if she had taken the time to look at her shipping papers bearing appellee's name, she would have distinguished between appellant and appellee [R. 268].

The remaining witnesses were either employees of appellant or good friends of appellant's president, who were engaged in the transfer business themselves. The gist of their testimony, given in answer to grossly leading questions, was that they recognized the shield used by appellant and might confuse it with the map symbol used by appellee. One of those witnesses, a Mr. Adams [R. 274], an employee of appellant, gave purely hearsay testimony about some alleged misdirected telephone calls. However, not one of the persons allegedly making any of the calls was produced, so that it was impossible to determine whether they were just careless or whether they had been confused as between appellant and appellee or as between appellant and one or more of the numerous other transfer companies using "National" as a trade-name prefix.

While it is true that actual confusion need not be proved where distinctive trademarks are concerned and where it is clearly apparent that confusion would result, such as where identical distinctive marks are used in their entirety; this rule does not apply in cases where the names

in issue are not distinctive but include generic words which everyone is free to use and which many do use. In those cases some isolated cases of confusion among careless purchasers might reasonably be expected, but such confusion is not actionable.

In *Steem-Electric Corp. v. Herzfeld-Phillipson Co.,* 118 F. 2d 122, 127 (7th Cir.), the court said:

> "Plaintiff points to the confusion occasioned by the alleged similarity of defendant's trade-name. There is some proof in this respect, but it does not follow that it was the result of the name employed by the defendant. In fact, we are of the opinion that such confusion as was shown was the result of the adoption by the plaintiff of a term, not only descriptive of its product, but one long employed by the public in describing the same product manufactured and sold by others."

In *American Automobile Association v. American Automobile Owners Association,* 216 Cal. 125, the court said:

> "The confusion that existed was due to the fact that plaintiff selected descriptive words for its name."

See also:

Trinidad Asphalt Mfg. Co. v. Standard Paint Co., supra.

L. There Is No Unfair Competition. [Findings 7, 11-21, 24.]

While appellant's brief and "specification of errors" do not appear to challenge the trial court's judgment in so far as alleged unfair competition is concerned, appellee respectfully submits that there is no unfair competition for the same reasons that there is no trademark infringe-

ment. There is no showing that appellee has acted with any fraudulent intent or bad faith and the trial court has found that he has not [Finding 20, R. 59].

The law of California is well settled that it is not unfair competition for anyone to use generic or commonly used trade-names and symbols.

In *American Automobile Association v. American Automobile Owners Association,* 216 Cal. 125, plaintiff, whose name was "American Automobile Association" and whose symbol was "AAA" within a diamond-shaped frame, sought to restrain the defendant, whose name was "American Automobile Owners Association" and whose symbol was "AAOA" within a diamond-shaped frame, from using said name and said symbol. In holding for the defendant the court said:

> "No claim of exclusive appropriation of diamond-shaped labels can be sustained, because diamond-shaped designs have been in use for many years and are commonly used in magazine, periodical, label and sticker forms of advertising.
>
> * * * * * * * *
>
> "The question here presented is by no means a novel one in the judicature of our federal courts, or of the courts of this state and sister states. The law has many times been considered in its application to wide and diversified subjects of mental and manual production, manufacture, industry, business and trade. The rule has been most frequently applied in controversies arising between publishers of magazines and periodicals, compounders of patent medicines and chewing gums, and candy manufacturers, where the claim of unfair competition has been made the issue. In Collegiate World Pub. Co. v. Dupont, 14 Fed. (2d) 158, plaintiff was the publisher of a publication

entitled 'College Humor,' and defendant subsequently began the publication of a magazine entitled 'College Comics.' Both publications occupied the same field. The general dress and size of the two publications were strikingly similar.

* * * * * * * *

"The court in the case of Collegiate World Pub. Co. v. Dupont, *supra,* in considering the question as to the likelihood of the name of one magazine being mistaken for the other, said:

" 'There was some confusion, but it was due to the carelessness or inattention of dealers and purchasers who did not know a new magazine had come out. Such confusion is to be expected at first, where a new magazine enters the field dealing with the same general subject-matter as a magazine already on the market. This confusion was negligible, and would soon disappear as the reading public came to know there were two magazines dealing with the humorous side of college life. The confusion that existed was due to the fact that plaintiff selected descriptive words for its name.

" 'Similarity in names of magazines dealing with the same subject is not unusual, but, on the contrary, is quite common, such as Popular Science, Popular Mechanics; Outdoor Life, Outdoor Recreation; Field and Stream, Forest and Stream; Boy's Life, Boy's Magazine; Ladies Home Journal, People's Home Journal; Radio Doings, Radio Digest, Radio World, Radio Age, Radio Progress, Radio News, Radio Broadcast; Motor, The Motor, Motor Transport, Motor Record, Motor World, Motor Age, Motor Life, etc.'

* * * * * * * *

"In this state the question of unfair competition received critical attention in Dunston v. Los Angeles

Van & Storage Co., 165 Cal. 89 (131 Pac. 115, 117), and Southern California Fish Co. v. White Star Canning Co., 45 Cal. App. 426 (187 Pac. 981). In the Los Angeles Van & Storage case, former Justice Henshaw gave consideration to the particular questions presented by the appeal in the instant case. Plaintiff Dunston established his business in 1896 and gave to it the name Los Angeles Van, Truck & Storage Co. In 1902 a certificate was issued to him by the Secretary of State granting him the sole and exclusive right to use said name. In 1910, defendants, so the complaint alleged, organized a corporation for the purpose of conducting a similar business to that of plaintiff in the City of Los Angeles, and fraudulently appropriated a similar name, to wit, Los Angeles Van & Storage Company. Plaintiff alleged that the name of the company last named was in imitation of his company's name, and was selected for the purpose of deceiving, and had deceived, his patrons and the general public. In disposing adversely of plaintiff's claim that the trade-name was susceptible of exclusive use, citing section 991 of the Civil Code, the court says: 'It is too apparent to need discussion that the name here employed by plaintiff has reference in its first words to the place of business; in the remaining words to a description of the business. Such names, titles or designations are not the subject of exclusive copyright or trade mark.' "

In *Antiquarian Book Store v. Antiquarian Book and Variety Store,* 39 Cal. 501, the court refused to restrain defendant from using said name, saying:

> "Terms in common use to designate a trade or occupation cannot be exclusively appropriated by anyone."

M. Appellee Has Not Violated the Contract, Exhibit 5.

Appellant charges that appellee's use of the trade-name "National Transfer & Storage Co." violates the contract in suit [Ex. 5].

The intention of the parties must be ascertained from the contract alone.

Cal. Civ. Code, Sec. 1639;

Republic Pictures Corp. v. Rogers, 213 F. 2d 662 (9th Cir.).

The contract recognizes appellee's right to carry on his own business under his own trade-name, both during and after the contract, so long as he did not use in his name any of the following specific combination of words:

"National Van"

"National Van Lines"

"National Van Lines, Inc."

or the insignia used by appellant.

As shown by the evidence, appellant has not used any such combination of words in his trade-name and has not used the shield insignia used by appellant.

There is no contention that appellee has solicited any business in the name of "National Van Lines, Inc." since the contract was terminated, and the only business booked in that name during the contract was the interstate shipments solicited for appellant under the contract.

The cases cited at pages 40, 41 of appellant's brief are not in any way analogous to the facts here involved. Those cited cases involved situations in which defendants had been licensed to sell trade-marked products of plain-

tiffs and, after the contracts were terminated, commenced selling other products under precisely the same names. Here, appellee was never licensed by appellant to use the name "National Transfer & Storage Co." On the contrary, the contract merely recognized appellee's right to use that name for his own independent transfer business and merely authorized appellee to book interstate shipments under appellant's name "National Van Lines, Inc."

Appellee ceased booking or solicitation of any business under the name "National Van Lines, Inc." as soon as the contract was terminated. There is no charge that he did so solicit any business after the contract.

N. Appellant Is Estopped to Complain of Appellee's Use of the Name "National Transfer & Storage Company."

Appellee is no longer using the name "National Transfer & Storage Company," but even if he were and even if appellant ever had any just cause to complain about it, it is submitted that appellant is now estopped to do so.

As pointed out hereinbefore, appellant knew from the beginning, in 1944, that appellee was carrying on and building up his own independent transfer business under the name "National Transfer & Storage Company." See the following testimony of appellant's president [R. 181].

> "Q. Now, you knew, did you not, that apart from the work which Mr. Dean was going to do for plaintiff, in the booking of interstate shipments, he was going to operate his own business, did you not? A. Yes, sir.
>
> Q. And you knew that throughout the period of your contract? A. Yes, sir. I might suggest that Al Dean had a very small business at that time and

we, by consent, agreed that his use of the name was all right.

Q. You did not express any complaint to his use of the name, did you? A. Not at that time, no sir.

Q. And you knew he was increasing his business as the years went on, did you not? A. In later years we recognized that fact."

Yet appellant made no complaint for a period of over seven years, while appellee expanded his business from a 4-van business to an 83-van business, which expansion obviously involved a substantial investment of money and change of position.

Thus, we have here all the elements of estoppel by laches. Appellee's operations were open and unconcealed and appellant had actual knowledge of them at all times. Appellant's failure to make any complaint for over seven years caused appellee to substantially change his position.

In *Procter & Gamble Co. v. J. L. Prescott Co.,* 102 F. 2d 773, 781 (3rd Cir.), the court aptly stated the rule as follows:

> "But it cannot be equitable for a well-informed merchant with knowledge of a claimed invasion of right, to wait to see how successful his competitor will be and then destroy with the aid of a court decree much that the competitor has striven for and accomplished—especially in a case where the most that can be said is that the trademark infringement is a genuinely debatable question."

See also:

Aunt Jemima Mills Co. v. Rigney & Co., 247 Fed. 407 (2nd Cir.);

Royal Silver Mfg. Co. v. National Silver Co., et al., 61 Fed. Supp. 232 (D. C., S. D., N. Y.).

VI.
CONCLUSION.

Appellee respectfully submits that the evidence fully supports the trial court's findings; that the findings fully support the judgment of dismissal upon each and all of the grounds of lack of service mark infringement, lack of unfair competition, invalidity of the alleged service marks in issue, lack of any violation of contract and upon the ground of estoppel by laches and acquiescence; that the findings are not "clearly erroneous" or erroneous in any respect; and that the judgment should be sustained.

Respectfully submitted,

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No. 14975

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL VAN LINES, INC., a corporation,
Appellant,

vs.

ALFRED E. DEAN trading under the firm name of NATIONAL TRANSFER & STORAGE CO.,
Appellee.

APPELLANT'S REPLY BRIEF

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TWENTIETH CENTURY PRESS, INC., CHICAGO

No. 14975

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL VAN LINES, INC., a corporation,
Appellant,

vs.

ALFRED E. DEAN trading under the firm name of NATIONAL TRANSFER & STORAGE CO.,
Appellee.

APPELLANT'S REPLY BRIEF

Defendant's casual treatment of certain critical issues brings them into sharp focus. Defendant had no adequate answer to plaintiff's facts and law concerning plaintiff's broad registration rights in its mark, the extensive confusion evidence of record and defendant's deliberate all-out imitation by later adding the vertical stripe design at the very time he terminated the agency relationship. These issues cannot be disposed of by avoiding a forthright answer. Nor can defendant justify its position by applying a strained interpretation of Rule 52(a) of the Rules of Civil Procedure.

It is apparent that defendant is seriously embarrassed by the existence of plaintiff's two federal registrations, which give it the broadest rights obtainable and appurtenant benefits. The district court likewise failed to cope with this fact and consequently failed to adjudicate this issue.

It is elementary that the benefits flowing from federal registration of a mark on the principal register are very substantial and are entitled to great weight. This was fully established by the statutes and authorities set forth in plaintiff's main brief (pp. 11-13, 16-18).

It is believed that this court will not be seriously impressed by defendant's vague attack wherein an attempt is made to challenge these significant rights, particularly the spurious argument that plaintiff may not monopolize a United States insignia (defendant's brief, pps. 14-15). With respect to the prohibition against registering such insignia as expressed in 15 USC 1052, the answer is of course obvious. Plaintiff's composite mark "NATIONAL" with vertical stripes—or for that matter the vertical stripes in the shield outline alone—is not a United States insignia or any other insignia. The statutory prohibition is very specific. Obviously it was considered by the officials charged with administering the trademark statutes when plaintiff's application for registration was before them. The United States Patent Office never raised any question as to plaintiff's right to register the vertical stripe design and it is the administrative agency charged with the initial enforcement of this statute.

Proceeding on the solid foundation represented by plaintiff's significant registration rights, we examine the next critical issue; namely, the existence of confusion or the mere likelihood thereof. It is noteworthy that defendant attempts to sweep aside plaintiff's voluminous record of confusion by a few general statements comprising less than two pages of its brief (pps. 18-19). Plaintiff's record abounds with examples of actual confusion at various levels in the trade. Numerous instances are of record, which are summarized in plaintiff's main brief (pps. 26-36). The confusion evidence involves many reports from

customers, employees, competitors and even defendant's own admission. Such evidence cannot be cast aside as the defendant has attempted to do by attacking the witnesses as "employees" or "good friends." Nor can the impact of such evidence be avoided by after-thought contentions that the testimony is hearsay or answers to leading questions. Nowhere during the trial or the taking of depositions did counsel make any of these objections to the confusion evidence adduced by plaintiff. The ineffectiveness of defendant's broadside attack on this evidence is further characterized by his reliance upon the general statements in *Dwinell-Wright Co.* v. *National Fruit Products Co.,* 140 F. 2d 618 (1st Cir.). Obviously such generalities have no useful application to a precise fact situation such as we have here.

It is also apparent that defendant is greatly disturbed about the fact that plaintiff has registered and asserts its mark as a *composite* unit comprising the NATIONAL name *with* the vertical stripes. Defendant repeatedly attacks these two units separately. Again it is elementary that in determining infringement and unfair competition a mark must be considered in its entirety. Comparison of marks by dissecting the elements is contrary to the established principles of law, *Schlitz Brewing Co.* v. *Huston Ice Co.,* 250 U. S. 28.

For some two decades plaintiff has used its composite mark comprising NATIONAL *with* the vertical stripes. It is this total mark which meets the eye of the public and it is this mark that plaintiff charges defendant has imitated to plaintiff's damage. We again emphasize that defendant was not content to merely adopt a "NATIONAL" name, but defendant deliberately added the vertical stripe design closely simulating plaintiff's some *six years* after it first adopted the "NATIONAL" name *without* design when originally licensed by plaintiff in 1944. Defendant never

advanced an explanation as to why he adopted the vertical stripe design just as he was cancelling the agency license with the plaintiff.

Analysis of defendant's efforts urging that NATIONAL is merely descriptive of the services rendered by both is indeed revealing. There is no issue here as to the use of "national" in its descriptive sense. *Here we are only concerned with the use of "NATIONAL" as a mark or name.* All arguments about descriptive meanings are entirely beside the point. Furthermore, the complaint is not directed to the mark "NATIONAL" alone, but the composite mark which includes the vertical stripe design.

In disposing of a similar contention by defendant the Court in *Leggett & Co.* v. *Premier Packing Co., Inc.,* 109 USPQ 215, said at page 217:

> "Concerning the characteristic of the word 'Premier,' I find and rule that its use by the plaintiff was not, in the main, in the adjectival or comparative sense, but rather as a symbol of substance. See *Raymond* v. *Royal Baking Co.,* 85 F. 231, and *Worcester Brewing Corp.* v. *Reuter & Co.,* 157 F. 217."

To the same effect also is this Court's pronouncement in *National Lead Co.* v. *Wolfe,* 233 F. 2d 195 at 199.

If defendant's untenable argument as to descriptiveness is carried to its logical conclusion it must follow that both plaintiff and defendant operate a coast to coast service without a name or mark of identification.

Plaintiff asserts that defendant has deliberately imitated its composite mark by using the "NATIONAL" name with the vertical stripe design. It is urged that these facts clearly spell out infringement. Even in the absence of reg-

istration rights plaintiff's record makes out a substantial case of unfair competition, *National Lead Co.* v. *Wolfe, supra.* This conclusion is established by the voluminous record showing many instances of actual confusion. Such facts cry for relief, not only under the broad aspects of unfair competition law, but also under the technical registration rights.

In view of the facts of record as these must be interpreted in the light of the long line of authorities, especially those established by this Court, it is urged that the findings and conclusions prepared by defendant's counsel which were adopted by the lower court, are clearly erroneous and incomplete. Rule 52(a) of the Rules of Civil Procedure was never intended to apply to situations like the present one. While numerous authorities have held that findings of a lower court will not be readily disturbed when such findings involve the credibility of witnesses, there is no such issue in the present record. In no instance were the witnesses of plaintiff challenged. Indeed, there is no basis for such challenge.

The courts have also repeatedly held, particularly in trademark cases, that the appellate court is in just as good a position as the lower court to evaluate the evidence and to make its own findings as to confusion and similarly of the marks in issue. Significant on this point is this Court's recent rulings in *National Lead Co.* v. *Wolfe, supra,* and *Mershon* v. *Pachmayr,* 220 F 2d 879.

Courts have been uniform in holding that in trademark and unfair competition cases the appellate tribunals are in as good a position to compare marks and determine the likelihood of confusion or actual confusion as the trial Court.

Brown & Bigelow v. *BB Pen Co.,* 191 F 2d 939 (CCA 8)

Albert Dickinson Co. v. *Mellos Peanut Co.,* 179 F 2d 265 (CCA 7)

Eastern Wine Corp v. *Winslow-Warren Ltd.,* 137 F 2d 955 (CCA 1)

Best & Co. v. *Miller,* 167 F 2d 374

In *Soy Food Mills Inc.* v. *Pillsbury Mills, Inc.,* 73 PQ 141, the Court of Appeals for the Seventh Circuit said:

> "We are of the opinion that not only is the factual question thus open to the appellate court, but it is our unavoidable duty to examine the two trademarks or trade names or copyrights and decide the question of fact for ourselves."

CONCLUSION

Defendant has not overcome plaintiff's prima facie rights as represented by its federal registrations. The most cursory examination of the respective marks demonstrates striking imitation. Defendant deliberately *added* the stripe design just before he cancelled his license with plaintiff. The record abounds with evidence of confusion, even deliberate palming off, and the significant admission by the defendant himself that there is confusion. In the face of these facts it seems idle to urge such trite defenses as descriptiveness, the right to use geographical names, alleged hearsay character of confusion evidence, and the like.

It is urged that the findings of the lower court are clearly erroneous and contrary to the evidence and that the judgment should be reversed.

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No. 14976.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TACETTIN SAY,

Appellant,

vs.

ALBERT DEL GUERCIO, ACTING DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT LOS ANGELES, CALIFORNIA, AND HENRY G. GRATTON, DEPORTATION AND PAROLE OFFICER,

Appellees.

APPELLEES' BRIEF.

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Appellees.

APPELLEES' BRIEF.

I.

Jurisdiction.

This Court has jurisdiction of this appeal pursuant to the provisions of 28 U. S. C. 1291, there being no dispute that the judgment of the United States District Court, filed on November 14, 1955, is a final decision [T. R. 24].

II.

Statutes and Regulations Involved.

Section 241(a)(9) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1251(a)(9)), pursuant to which plaintiff was found deportable, reads as follows:

"*§1251. Deportable aliens—General classes*

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * * * * *

"(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status; . . ."

Section 3(5) of the Immigration Act of 1924 (8 U. S. C. 203, 1940 Ed.), under which definition plaintiff was a nonimmigrant, and classified as a seaman eligible to remain in the United States for not longer than 29 days after his original entry on May 30, 1952, reads in part as follows:

"*§203. Immigrant defined*

"When used in this chapter the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except . . . (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman . . ."

Section 15 of the Immigration Act of 1924 (8 U. S. C. 215) reads in part as follows:

"*§215. Admission of persons excepted from definition of immigrant and nonquota immigrants; maintenance of exempt status*

"The admission to the United States of an alien excepted from the class of immigrants by clauses . . . (5) . . . of section 203 of this title, or declared to be a nonquota immigrant by subdivision (e) of section 204 of this title, shall be for such time and under such conditions as may be by regulations prescribed . . ."

Section 120.21 of the Federal Regulations (8 C. F. R. 120.21) limits the stay of seamen to not more than 29 days.

Sections 8.1(c) and 8.11 of Title 8 of the Code of Federal Regulations (8 C. F. R. 8.1 and 8.11, Revised 1952), relating to Motions to Reopen and Reconsider, which do not stay deportation, provide as follows:

> "§8.1 *Reopening and reconsideration.* Except as provided in §6.2 of this chapter, a hearing or examination in any proceeding provided for in this chapter may be reopened or the decision made therein reconsidered for proper cause at the instance of, or upon motion by the party affected and granted by:
>
> * * * * * * * *
>
> "(c) The special inquiry officer, if the decision in the case was made by him, unless the record in the case previously was forwarded to the Board or to the Assistant Commissioner, Inspections and Examinations Division.
>
> "A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure of such person from the United States occurring after the making by him of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.
>
> "§8.11 *Motion to reopen or reconsider*—(a) *Filing.* A motion to reopen or a motion to reconsider shall be filed in triplicate with the district director or officer in charge having administrative jurisdiction over the place where the proceedings were conducted, for transmittal to the officer having jurisdiction to act on the motion as provided in §8.1. * * * *The filing of a motion to reopen or a motion to recon-*

sider under this part shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay is specifically granted by the district director or the officer in charge having administrative jurisdiction over the case." (Emphasis added.)

Section 242.53(e) of Title 8, Code of Federal Regulations (Revised 1952), relating to Withdrawal and Substitution of Special Inquiry Officer, provides as follows:

"(e) *Withdrawal and substitution of special inquiry officer.* The special inquiry officer assigned to conduct the hearing may at any time withdraw if he deems himself disqualified. If a special inquiry officer becomes *unavailable* to complete his duties within a reasonable time, another special inquiry officer shall be assigned to complete the case. In such event, the new special inquiry officer shall familiarize himself with the record in the case and shall state for the record that he has done so." (Emphasis added.)

The Operations Instruction of the Immigration and Naturalization Service defining "unavailability" of Special Inquiry Officer reads as follows:

"Operations Instruction—Unavailability of Special Inquiry Officer.

"A finding of unavailability warranting the substitution of a special inquiry officer is justified when he has left the Service; when he is undergoing a serious or prolonged illness and there is no prospect of his immediate return to duty; or *when he has been permanently transferred from the district in which the case originated and is stationed in another district considerably distant from the place where the continued hearing is to be held.* A substitution may also be made for any other good reason, provided objection to such substitution is waived." (Emphasis added.)

III.

Statement of the Case and Argument.

This is a case in which no challenge is made as to the deportation order herein, which has been final since August 15, 1953, whereby plaintiff was found to be an alien and citizen of Turkey, deportable because, as a non-immigrant who entered the United States May 30, 1952, he failed to comply with the conditions of that status, as provided by the Immigration Act of 1924 and the Immigration and Nationality Act of 1952, and applicable regulations, (see statutes involved, and regulations, *supra*), in that he remained in the United States longer than 29 days.

The issue in the lower court, and here, relates to the Motion to Reopen Proceedings and for Stay of Deportation, filed with the Immigration and Naturalization Service on May 18, 1955.

Authority of District Director to Deny Stay.

Two questions are raised. It seems to be objected that Albert Del Guercio, District Director, through Henry G. Gratton, in a letter to plaintiff's attorney dated June 1, 1955, denied that portion of the Motion relating to a Request for Stay of Deportation. It is alleged in paragraph IV of the complaint [T. R. 1], and admitted in the answer [T. R. 8], that Mr. Gratton was the Deportation and Parole Officer and under the direct supervision of Albert Del Guercio in the Los Angeles Office. Mr. Del Guercio was the officer in charge, *i. e.,* the District Director. Paragraph XVI of the complaint [T. R. 5] sets forth the contents of the letter denying the Motion for Stay, which is admitted by the answer. The complete answer to the question of the authority of the Officer in Charge to deny the Motion for Stay, is contained in Section 8.11 of

the Regulations (see statutes involved, *supra*), which provides that "execution of the decision shall proceed unless a stay is specifically granted by the District Director," and we will not discuss that question further in this brief.

The Administrative Finding That the Original Special Inquiry Officer Was "Unavailable" Should Be Affirmed.

The Second and main point raised by appellant is that David S. Caldwell, the Special Inquiry Officer who made the original decision or Order of Deportation in Seattle, Washington, did not consider and decide the Motion to Reopen, which was filed in Los Angeles, California. It is argued that Section 8.1(c) of the Federal Regulations (see statutes involved, *supra*), requires that the Special Inquiry Officer who made the decision in the case must be the one to grant or deny a Motion to Reopen.

The Motion to Reopen was filed in the Los Angeles Office May 18, 1955. This is alleged in paragraph XIII of the complaint [T. R. 4] and admitted in the answer, and it is stipulated [T. R. 29] Mr. David S. Caldwell the Special Inquiry Officer who made the original deportation decision, on January 1, 1955, was transferred from Spokane, Washington, to San Antonio, Texas, as a Supervisory Immigrant Inspector and not as a Special Inquiry Officer.

Section 242(b) of the Immigration Act of 1952 (8 U. S. C. 1252(b)) provides that "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien . . ."

It is clear from this section that only a special inquiry officer appointed pursuant to 8 U. S. C. 1101(b)(4) by the Attorney General, could conduct the proceedings, and Mr. Caldwell was no longer a special inquiry officer.

The Administrative File of the Immigration and Naturalization Service, which was introduced in evidence as Defendant's Exhibit "A", shows that "Donald W. Main, Special Inquiry Officer", at Los Angeles, California, denied the Motion to Reopen on July 15, 1955. A copy of Mr. Main's decision is attached hereto as an Appendix to this brief.

The precise problem is whether, by reason of Mr. Caldwell's transfer from Seattle, Washington, to San Antonio, Texas, and his change of employment from Special Inquiry Officer to Supervisory Immigrant Inspector, he was "unavailable" within the meaning of Section 242.53(e) of the Regulations and the Operations Instruction of the Immigration Service (*supra*).

It is clear from the stipulated facts that prior to the time the Motion to Reopen and for Stay was filed that Mr. Caldwell was "permanently transferred from the district in which the case originated" and was "stationed in another district considerably distant." Not only was he so transferred, but he was no longer a Special Inquiry Officer, and therefore a substitution could validly be made under the Regulations and Operations Instruction.

Further, plaintiff was within the Los Angeles District, where Mr. Main, the substituted Special Inquiry Officer who decided the Motion to Reopen, was.

It is clear Mr. Main had the Regulations and the Instructions in mind for in his written decision denying the motion (see Appendix) he discusses the "unavailability" of Mr. Caldwell, and also states, as required by the Regulation, that he has "thoroughly familiarized myself with the entire record in the case." The District Court also made the finding that Mr. Caldwell was unavailable. [T. R. 22.]

It is submitted that there was no denial of due process in the denial of the Motion to Reopen, that all proceedings were in compliance with the law and regulations, and that the judgment of the lower court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

ARLINE MARTIN,
Assistant U. S. Attorney,

Attorneys for Appellees.

APPENDIX.

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File E- 055 266—San Francisco

Jul 15, 1955

In re: TACETTIN SAY
IN DEPORTATION PROCEEDINGS
IN BEHALF OF RESPONDENT: Harry Wolpin
Attorney at Law
1809 Canyon Drive
Los Angeles 28, Calif.

CHARGES:

Warrant: Immigration and Nationality Act and Act of 1924—Failed to comply—Seaman.

Lodged: None

APPLICATION: Motion to reopen.

DETENTION STATUS: Released parole supervision.

DISCUSSION: This case is before the undersigned Special Inquiry Officer on motion to reopen submitted by counsel on May 18, 1955. The motion also requests a stay of deportation. Mr. David S. Caldwell, the Immigration Officer and then Special Inquiry Officer before whom this case was originally heard and who entered the initial decision at Seattle, Washington on August 3, 1953, is no longer available as a Special Inquiry Officer having been appointed Supervisory Immigrant Inspector at San Antonio, Texas. The original Special Inquiry Officer being unavailable, the motion has been assigned to the undersigned for consideration. I have thoroughly familiarized myself with the entire record in this case and

my decision on the motion will be based upon that record. My decision will be upon that portion of the motion relating to reopening of proceedings, there being no authority vested in me to act upon the request for stay of deportation.

In that portion of the motion under consideration, the respondent requests that proceedings be reopened in order that the warrant of deportation may be withdrawn and he be granted preexamination and voluntary departure in lieu of deportation. He states in the motion that he is married to a citizen of the United States whose petition for the issuance to him of a nonquota immigrant visa has been approved by the Immigration and Naturalization Service and, further, that he intends to transfer his application for an immigrant visa from the American Consulate at Tijuana, Baja California, Mexico to Vancouver, British Columbia, Canada.

The record shows that at the close of the deportation hearing accorded the respondent at Seattle, Washington, on August 3, 1953. the Special Inquiry Officer granted the respondent the privilege of voluntary departure from the United States at his own expense in lieu of deportation with the further order that should he fail to depart when and as required by the Officer in Charge having jurisdiction of the office in which the case was pending or the District Director, he should then be deported without further proceedings. The Special Inquiry Officer's decision was served upon the respondent by registered mail on August 4, 1953. No appeal was taken from the decision and the order became final August 15, 1953. On August 24, 1953 the respondent was notified by the District Director of the Seattle District of the Immigration and Naturalization Service that in accordance with the

terms of the order his departure from the United States on or before October 15, 1953 would be considered satisfactory compliance with the order and that should he fail to depart on or before that date, the privilege of voluntary departure would be withdrawn and the order for his deportation entered. On that date, August 24, 1953, he was released from custody on conditional parole for the purpose of departing voluntarily from the United States. As a condition to his parole he was required to report in writing his whereabouts on the 10th and 24th of each month. He was also required to report any change of address from one Immigration District to another and to obtain permission from the Service for any such change at least forty-eight hours prior to such change. The record shows that following his release the respondent complied with none of the conditions of his parole but absconded. Nothing more was heard from him until July 28, 1954 when he was reapprehended by Immigration officers at Encinitas, California. A warrant of deportation was issued on August 20, 1954.

On September 7, 1954 the respondent, through counsel, submitted a petition to reopen proceedings in order to set aside the order of deportation. The Special Inquiry Officer who ordered the initial decision considered the motion to reopen on September 14, 1954. In his order that date he declined to consider the motion as a valid motion to reopen on the ground that the petition failed to state new facts to be proved and was unsupported by affidavits or other evidentiary material as required by Section 8.11 of Title 8, Code of Federal Regulations. He then considered the petition as a motion to reconsider and thereupon reaffirmed his initial decision as it related to deportation.

In the motion presently under consideration the respondent again fails to state new material facts to be proved and the motion is unsupported by affidavits or other evidentiary material. The motion to reopen therefore will be denied and the initial decision of the Special Inquiry Officer entered on August 3, 1953 as it relates to respondent's deportation will be affirmed.

ORDER: It is ordered that the respondent's petition for reopening proceedings be and the same is hereby denied.

IT IS FURTHER ORDERED that the initial decision and order of the Special Inquiry Officer entered on August 3, 1953 ordering deportation of the respondent upon his failure to comply with the conditions under which voluntary departure was granted be affirmed.

Donald W. Main
Special Inquiry Officer

DWM/emd

14977 519

United States Court of Appeals for the Ninth Circuit

ON APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

In the Matter of S. P. BEECHER,
Farm Debtor.
No. B-7848

The Leavenworth State Bank,
The Federal Land Bank of Spokane,
Homer Smithson, John McCoy,
Lyle Timpe, Ben Maxwell,
Leavenworth Fruit Co. and
Eagle Transfer and Storage Co.,
Arrow Transfer & Storage Co.,
Appellees.

PETITION BY S. P. BEECHER, FARM DEBTOR, UNDER SECTION 75 OF THE BANKRUPTCY ACT

PETITION FOR REHEARING

Presented by
S. P. BEECHER, *Farm Debtor,*
Cashmere, Washington

CRAFTSMAN PRINTING CO., WENATCHEE, WASHINGTON

United States Court of Appeals for the Ninth Circuit

In the Matter of
S. P. BEECHER,
Farm Debtor.

No. 14979
and Misc. No. 519
March 28, 1956.
District Court No. 7848

PETITION FOR REHEARING

To the Honorable Chief Judge Denman, and Pope and Chambers, Circuit Judges.

Comes now S. P. Beecher, the Farm Debtor herein, and Prays the Court for a rehearing on the matters heard on February 27, 1956, on the following grounds.

Farm Debtor is not an attorney, and has been denied an attorney or the services of the Conciliation Commissioner, or money to employ an attorney throughout the entire proceedings.

Although the rents and profits from the property involved, have been in excess of $100,000.00 and the appraised value for redemption has been determined at $25,550.00, *or over four times the amount required under the law to liquidate his indebtedness, and as the secured creditor the Federal Land Bank of Spokane said in open Court on* May 7, 1947, Tr. 12084, Vol. 1, p. 126, quote:

MR. NEWTON: "I want to state further that Mr. Beecher has expressed the idea he wants to pay his creditors. His conduct doesn't show any such thing. There's enough money in the hands of the receiver and Conciliation Commissioner to pay off everything he owes, leave the farm free and clear, and money to boot, and the creditors will join in any effort he wants to make." And see: p. 47, same date, May 7, 1947.

MR. BEECHER: "Your Honor, there's—I don't know the amount the receiver has got: I know that I have got thirty thousand dollars that could be made available to me, and a man with thirty thousand dollars in my account but which is being refused me, until the Court release—why more than enough to redeem and pay all my debts. The Court has got me tied up so I can't get out from Frazier-Lemke.

THE COURT: Do you want this money applied to pay your creditors?

MR. BEECHER: I do.

THE COURT: I'll assist you in that, if it can be done; at least a partial distribution.

MR. BEECHER: The amount the receiver has still got, I'm questioning the final report of the receiver. I'll admit under the circumstances I can't expect that money, but I can expect this thirty thousand dollars that are proceeds of last year's crop. I don't want this

thirty thousand dollars to buy outside property, or dissipate or scatter around. I want to liquidate my debts and get out from under."

Again Farm Debtor wishes to remind the Court that the final appraisal for redemption purposes was $25,-550.00 and over $30,000.00 available for redemption at that time. The Act very definitely states that the final appraised value of the property is the principal which the Farm Debtor is liable for to receive his property free and clear of incumbrances. See: Section 75 (s) (3).

The General Bankruptcy Act Section 65 (e) reads:

"A claimant shall not be entitled to collect from a bankruptcy estate any greater sum than shall accrue pursuant to the provisions of the Act."

The Supreme Court has repeatedly said that Section 75 (s) is an orderly proceeding and cannot be deviated from. The opinion by Judge Douglas in *Wright v. Union Central*, 311 U.S. 273, is offered as Farm Debtor's argument for rehearing, as follows:

Wright v. Union Central, 311 U.S. 275.

> "* * * We granted certiorari because of the importance of the problem to the orderly administration of the Act. * * * This Act provides a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. *Wright v. Union Central Ins. Co.*, Supra; *John Hancock Mutual Life Ins. Co. v. Bartels*, Supra; *Kalb v. Feuerstein*, 308 U.S. 433. Safeguards were

provided to protect the rights of secured creditors throughout the proceedings to the extent of the value of the property. *John Hancock Mutual Life Ins. Co. v. Bartels*, Supra. *Borchard v. California Bank*, 310 U.S., at p. 317, *There is no Constitutional claim of the creditors for more than that. And so long as that right is protected the creditors are certainly in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress, lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and letter of the Act* * * *

"To hold that the Court has the discretion to grant or deny the debtor's right to redeem at the reappraised value would be to rewrite the Act so as to vest in the Court power which Congress did not plainly delegate. This discretionary power of the Court is exhausted when the court terminates the proceedings or accelerates their termination. **Such termination can be effected only pursuant to the precise procedure which Congress has provided."**

This Court must scan the record and determine whether this "Orderely Procedure Has Been Violated."

See: Appendix "A" p. 16a and p 17a

Under date Aug. 4, 1947 Tender for redemption		$ 9,170.00
Under date Oct. 2, 1947 Tender Redeem Per. Prop.		1,000.00
June 16, 1951 J. M. Wade Replace	Ck. No. 5020	4,328.74
June 16, 1951	Ck. No. 6244	1,000.00
June 16, 1951	Ck. No. 6423	1,500.00
Bal. open account		2,734.43
Jan. 31, 1952 DeBord Fruit Company		300.00
June 11, 1952 Geo. Faskin (Crop proceeds)		8,000.00
June 11, 1952 Revolving Fund Certificate		876.54
		$28,909.71
Appraised value of property for redemption purposes		25,550.00
Surplus		$ 3,359.71

Excess of Cash over the redemption.
Other large sums unaccounted for.

All rents and profits and under Section 75 (s) available for redemption purposes, and which this Court and the District Court has refused to recognize. A plain violation of the procedure provided by Congress.

The appointment of a trustee in General Bankruptcy is another proceeding not provided for.

This Court in its opinion of December 24, 1953, says in part, p. 4:

> "We do not here decide whether the appointment of the trustee and the order of sale were proper. We hold only that the court below did not lose jurisdiction to appoint a trustee and to order a sale of the property when Beecher deposited the $9,170.00 into the registry of the court. The question of the propriety of the appointment of a trustee is a matter for determination when appeal No. 13,693 is heard on the merits."

Another question for determination is under Section 75. Can a farmer be adjudicated an involuntary bankrupt without notice and without trial or at all? Section 4 (b) or the Bankruptcy Act.

> "(b) Any natural person except a wage earner or farmer, * * * can be adjudged an involuntary bankrupt."

The Supreme Court in *Valley v. Northern Fire Ins. Co.*, 254 U.S. 343, at p. 351.

> "Courts are constituted by authority, and they cannot go beyond the power delegated to them, if

worth State Bank, without a bond for costs and damages and without notice, secured the appointment of a receiver and dispossessed Farm Debtor of all his property including his exemptions. The prayer of that petition is as follows:

See: Transcript 10789, p. 2-5:

> "WHEREFORE your petitioner prays that a receiver be appointed forthwith by this Court *for all the property of said bankrupt to protect and preserve the same for the benefit of all parties interested therein.*"

No report pursuant to foregoing was ever filed, Farm Debtor pleaded for this accounting. The profits of this Receiver Harold D. Couch, was approximately $70,000.00, which would be far more than enough to have liquidated Debtor's indebtedness.

The District Court ruled that this sum was not available to liquidate indebtedness, and without reference to the provisions of Section 75 (s) and the court decisions herein set out, ruled that the rents and profits belonged exclusively to the creditors and were not available for application on the principal of the claims.

Section 75 (s) (3) of the Bankruptcy Act:

> "At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on *principal.* Provided, that upon request of any secured or unsecured, or upon

request of the debtor, the court shall cause a re-appraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on *principal* for distribution to all secured and unsecured creditors as their interests may appear and thereupon the court shall by an order turn over full possession and title to said property, free and clear of encumbrance to the debtor * * *."

It is clear that the definition of principal for Frazier Lemke purposes is the appraised value. That appraised value in this instance was $25,550.00.

These are all matters important to the orderly procedure which Congress and the Supreme Court say must be complied with. This Court has never ruled upon them.

The District Court says the money will remain in the registry of the Court until the disposition thereof has been finally decided. See Order of the District Court of June 20, 1951. The final decision by this Court is still pending with over $100,000.00 rents and profits passing through the hands of the District Court, and only $25,500.00 required under the Act. Section 65 of the Bankruptcy Act establishing that sum as the limit that claimants may lawfully collect. It is imperative that a rehearing be granted to relieve this proceeding of its chaotic condition.

S. P. BEECHER,
Cashmere, Wash.

Affidavit

S. P. Beecher being first duly sworn on oath deposes and says: That he is the petitioner herein, that he has prepared the attached petition for rehearing, knows the contents thereof, and that the same is presented in good faith and not for the purpose of delay and that he is entitled to the relief he seeks.

S. P. BEECHER, Farm Debtor,
Cashmere, Washington.

Subscribed and sworn to before me this 23rd day of April, 1956.

R. J. MCKELLAR,
Notary Public in and for the State of Washington residing at Cashmere.

Affidavit of Service by Mail

S. P. Beecher being first duly sworn deposes and says that service by mail was held as follows on the hereafter named parties: Randall and Danskin, 1017 Paulsen Bldg., Spokane, Wash.; Federal Land Bank of Spokane, Spokane, Wash.; John J. Ripple, 1705 North Division St., Spokane, Wash.; John McCoy, Peshastin, Washington; Lyle Timpe, Peshastin, Wash.; Leaven worth Fruit Company, Leavenworth, Wash.; Eagle Transfer and Storage Co., Wenatchee, Wash.; Arrow Transfer Co., Wenatchee, Wash.; Ben Maxwell, 2421 Altman St., Los Angeles, California; and Sam M. Driver, P. O. Box 1493, Spokane, Washington.

Mailing was done on Monday, April 23, 1956, in the United States Post Office in Wenatchee, Washington, in securely sealed and addressed envelopes, postage fully paid and addressed as aforesaid.

S. P. BEECHER, Farm Debtor,
Cashmere, Washington

Sworn to before me this 23rd day of April, 1956.

R. A. MCKELLAR
Notary Public in and for the State of Washington, residing at Cashmere.

No. 14984

United States
Court of Appeals
for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

WILLIAM G. OSTLER, Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —2-8-56

No. 14984

United States
Court of Appeals
for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

WILLIAM G. OSTLER, Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

The Tax Court of the United States

Docket No. 52185

WILLIAM G. OSTLER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Appearances:

For Respondent: Richard W. Janes, Esq.

DOCKET ENTRIES

1954

Mar. 15—Petition received and filed. Taxpayer notified. Fee paid.

Mar. 16—Copy of petition served on General Counsel.

May 5—Answer filed by General Counsel.

May 5—Request for hearing in Los Angeles, California filed by General Counsel.

May 6—Notice issued placing proceeding on Los Angeles, California calendar. Service of answer and request made.

1955

Mar. 25—Hearing set July 5, 1955, Los Angeles, California.

Apr. 18—Notice hearing date changed to 6/20/55, Los Angeles, California.

1955

Jun. 23—Hearing had before Judge Black, on merits. Stipulation of facts filed. No briefs.

Jul. 13—Transcript of hearing 6/23/55 filed.

Jul. 25—Memorandum findings of fact and opinion filed, Judge, Black. Decision will be entered for the petitioner. Copy served.

July 26—Decision entered, Judge, Black.

Oct. 17—Petition for review by United States Court of Appeals, Ninth Circuit, filed by respondent.

Oct. 27—Proof of service on petitioner filed.

Nov. 16—Motion for extension to December 27, 1955 for filing the record and docketing the appeal filed by respondent.

Nov. 18—Order extending time to December 27, 1955 for filing the record and docketing the appeal, entered.

Nov. 29—Statement of points with statement of service by mail to William G. Ostler, filed by respondent.

Nov. 29—Designation of contents of record with statement of service by mail to William G. Ostler filed by respondent.

Dec. 2—Supplemental designation of contents of record with statement of service by mail thereon filed by respondent.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency ARC-Ap:SF and LA:90D:CTF dated December 14, 1953 and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with residence at 2626½ East Glenn Avenue, Tucson, Arizona. The return for the period here involved was filed with the collector for the district of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on December 14, 1953.

3. The taxes in controversy are income taxes for the year 1950, and in the amount of One Thousand Two Hundred Ninety Two Dollars and Thirty-five Cents.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors: (a) Petitioner has been denied the right to file a joint return with Frances S. Ostler, who was petitioner's wife until March 1951.

5. The facts upon which the petitioner relies as the basis for this proceeding are as follows: (a) Frances S. Ostler secured an interlocutory decree of diverce from petitioner February 27, 1950. (b) Petitioner filed a joint return for the entire year of

1950 which took advantage of a loss of $3100.00 from a sale of rental property. (c) Frances S. Ostler secured a decree of divorce from petitioner in March 1951. (d) Petitioner denied right to file joint return by Bureau of Internal Revenue. (e) On March 11, 1953 the Tax Court ruled in the case of Marriner S. Eccles vs. Commissioner, Docket 32, 823, in an opinion by Judge Hall that a decree of divorce interlocutory in nature did not deprive the petitioner of the right to file a joint return and (f) petitioner receives a notice of deficiency alleging taxes due in the amount of $1292.35.

Wherefore, the petitioner prays that this Court may hear the proceedings and grant petitioner the right to file his said joint return for the year 1950, which right is denied at present by the Commissioner of Internal Revenue.

/s/ WILLIAM G. OSTLER

Duly Verified.

EXHIBIT A

U. S. Treasury Department, Office of the Regional Commissioner, Internal Revenue Service, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California.

In replying refer to: ARC-AP:SF LA:90D:CTF

Mr. William G. Ostler Dec. 14, 1953
2626½ East Glenn Avenue, Tucson, Arizona

Dear Mr. Ostler:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1950 discloses a deficiency of $1,292.35, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90 day period.

Should you not desire to file a petition, you are

requested to execute, in duplicate, the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner of Internal Revenue

Enclosures: Statement, Form 1276, Agreement Form.

[Endorsed]: T.C.U.S. Filed March 15, 1954.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney Daniel A. Taylor, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. (a). Denies the allegations of error contained in section (a) of paragraph 4 of the petition.

5. (a) and (b). Admits the allegations contained in sections (a) and (b) of paragraph 5 of the petition.

(c) Denies for lack of knowledge as to the truth or correctness thereof the allegations contained in section (c) of paragraph 5 of the petition.

(d), (e) and (f). Admits the allegations contained in sections (d), (e) and (f) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ DANIEL A. TAYLOR, REM
Chief Counsel, Internal Revenue Service

Of Counsel:

T. M. Mather, Acting Regional Counsel,

E. C. Crouter, Assistant Regional Counsel,

R. E. Maiden, Jr., Special Assistant to the Regional Counsel,

Charles H. Chase, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed May 5, 1954.

[Title of Tax Court and Cause.]

MEMORANDUM OF FINDINGS OF FACT AND OPINION

Filed July 25, 1955.

On March 15, 1951, a joint individual income tax return was filed with the Collector of Internal Revenue of Los Angeles, California, by petitioner and his then wife. On or about February 27, 1950, petitioner's wife secured an interlocutory decree of divorce from petitioner. This interlocutory decree of divorce did not become final until on or about March 13, 1951. The Commissioner in his determination of the deficiency has held that petitioner and his wife did not have the right to file a joint return for the calendar year 1950 and has made certain adjustments to petitioner's net income for 1950 in accordance with this determination. Held, the petitioner and his wife, Frances S. Ostler, were husband and wife on December 31, 1950, and were entitled to file a joint return. Marriner S. Eccles, 19 T.C. 1049, followed.

Richard W. Janes, Esq., for the respondent.

The Commissioner has determined a deficiency in petitioner's income tax for the calendar year 1950 of $1,292.35. To this determination of the Commissioner petitioner assigns error as follows:

The determination of tax set forth in the said notice of deficiency is based upon the following errors: (a) Petitioner has been denied the right to

file a joint return with Frances S. Ostler, who was petitioner's wife until March 1951.

Findings of Fact

The facts have been stipulated and are adopted as our Findings of Fact. Such portions of the facts which have been stipulated as are deemed necessary to an understanding of the issue which is to be decided are summarized as follows:

The petitioner, William G. Ostler, is an individual with residence at Tucson, Arizona.

On March 15, 1951, a joint individual income tax return, Form 1040, was filed with the Collector of Internal Revenue at Los Angeles, California. This joint return was filed by petitioner and his then wife, Frances S. Ostler, sometimes hereinafter referred to as Frances.

On or about February 27, 1950, Frances secured an interlocutory decree of divorce from petitioner. The joint return filed by petitioner and Frances claimed a total of three exemptions, one each for the principal taxpayers and one for a daughter, Mary Jane Ostler. The items respecting income, deductions, and losses stated and claimed upon this joint return were computed and reported upon the community property basis. Both petitioner and Frances each had individual sources of income from their labor and ownership of productive property and property rights.

Prior to the calendar year 1950, during that year, and for a period of time thereafter, both petitioner

and Frances were domiciled in and residents of the State of California.

The interlocutory decree of divorce obtained February 27, 1950, became final on or about March 13, 1951.

On December 14, 1953, a statutory notice of deficiency in the amount of $1,292.35 for the calendar year 1950 was mailed to petitioner. The basis for the adjustments making up the deficiency was that, under the provisions of section 51(b) of the Internal Revenue Code of 1939, petitioner and Frances could not file a joint return for the taxable year ended December 31, 1950, since the interlocutory decree of divorce was granted February 27, 1950. The deficiency of $1,292.35 resulted from a reallocation of community income to separate incomes of petitioner and Frances.

Opinion

Black, Judge: We have only one issue in this proceeding and that is whether or not petitioner had a right to file a joint return for the taxable year 1950 with Frances, who had secured an interlocutory decree of divorce from petitioner on or about February 27, 1950. It is stipulated that this interlocutory decree of divorce did not become final until on or about March 13, 1951.

At the hearing in this proceeding held in Los Angeles, California, June 23, 1955, petitioner did not appear, he being ill at the time of the hearing. Respondent appeared by his counsel and presented

a complete stipulation of facts which had been agreed upon by the parties.

Respondent's counsel stated that the only issue involved in the proceeding is the same as the Tax Court had before it and decided in Marriner S. Eccles, 19 T.C. 1049, affirmed per curiam (C.A. 4) 208 F.2d 796. Respondent has not acquiesced in the Tax Court's decision in the Eccles case and its affirmance by the Fourth Circuit and still contests the point in the instant case. The Division of the Court hearing the proceeding, upon being advised that the only issue involved was the same as that present in the Eccles case, stated that no briefs would be required and that the issue would be decided for petitioner upon authority of the Eccles case.

It will be noted that among other things stated in the stipulation of facts are these:

7. On December 14, 1953, a statutory notice of deficiency in the amount of $1,292.35 for the calendar year 1950 was mailed to petitioner. The basis for the adjustments making up the deficiency was that, under the provisions of Section 51(b) of the Internal Revenue Code of 1939, petitioner and Frances S. Ostler could not file a joint return for the taxable year ended December 31, 1950, since the interlocutory decree of divorce was granted on February 27, 1950. The deficiency of $1,292.35 resulted from a reallocation of community income to separate incomes of petitioner and Frances S. Ostler. * * *

Section 51(b) of the 1939 Code was quoted and discussed by us in Marriner S. Eccles, supra, and the interpretation of this section which respondent seeks to give to it in his deficiency notice was denied by us. We see no reason to change our views.

In the Eccles case, supra, we held that where the taxpayer was divorced under an interlocutory decree on August 2, 1949, which did not provide for separate maintenance of either party, the decree of divorce becoming final six months after that date, that under the laws of the State of Utah, domicile of the parties, the taxpayer and his wife were husband and wife on December 31, 1949, and were entitled to file a joint return. See also Alice Humphreys Evans, 19 T.C. 1102, affirmed 211 F.2d 378. The fact that in the Eccles case the husband and wife were domiciled in the State of Utah, whereas here they are domiciled in the State of California, makes no difference. In a joint return all items of income of either spouse are included and all items of deductions to which either is entitled are taken and the tax liability is computed as one tax liability and both husband and wife are jointly and severally liable for the tax shown on the return.

We decide the only issue involved in this proceeding in favor of the petitioner.

Decision will be entered for the petitioner.

[Endorsed]: T.C.U.S. Received July 13, 1955.

The Tax Court of the United States
Washington

Docket No. 52185

WILLIAM G. OSTLER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed July 25, 1955, it is

Ordered and Decided: That there is no deficiency in income tax for the calendar year 1950.

[Seal] /s/ EUGENE BLACK,
Judge

Entered: July 26, 1955.

Served: July 27, 1955.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above-named taxpayer that the following facts are true.

1. The petitioner, William G. Ostler, is an individual with residence at 2626½ East Glenn Avenue, Tucson, Arizona.

2. On March 15, 1951, a joint individual income tax return, Form 1040, was filed with the Collector of Internal Revenue at Los Angeles, California. This joint return was filed by petitioner, William G. Ostler, and his then wife, Frances S. Ostler.

3. On or about February 27, 1950, Frances S. Ostler secured an interlocutory decree of divorce from petitioner.

4. The joint return filed by petitioner and his wife claimed a total of three exemptions, one each for the principal taxpayers and one for a daughter, Mary Jane Ostler. The items respecting income, deductions, and losses stated and claimed upon said joint return were computed and reported upon the community property basis. Both petitioner and his then wife each had individual sources of income from their labor and ownership of productive property and property rights.

5. Prior to the calendar year 1950, during said year, and for a period of time thereafter, both petitioner and his then wife, Frances S. Ostler, were domiciled in and residents of the State of California.

6. The interlocutory decree of divorce obtained February 27, 1950, became final on or about March 13, 1951.

7. On December 14, 1953, a statutory notice of deficiency in the amount of $1,292.35 for the calendar year 1950 was mailed to petitioner. The basis

for the adjustments making up the deficiency was that, under the provisions of Section 51(b) of the Internal Revenue Code of 1939, petitioner and Frances S. Ostler could not file a joint return for the taxable year ended December 31, 1950, since the interlocutory decree of divorce was granted on February 27, 1950. The deficiency of $1,292.35 resulted from a reallocation of community income to separate incomes of petitioner and Frances S. Ostler. The adjustments to net income as per the statutory deficiency notice are, as follows:

"Net income as disclosed by return (joint return filed)		$ 7,227.25
Unallowable deductions:		
(a) Loss from business disallowed		300.72
(b) Loss from sale of property disallowed		3,100.00
Total		$10,627.97
Decrease in income and additional deduction:		
(c) Salaries decreased	$967.50	
(d) Rental income eliminated	213.00	
(e) Standard deduction increased	196.97	1,377.47
Net income adjusted (your separate net income)		$ 9,250.50

Explanation of Adjustments

(a) There is eliminated from your net income the loss claimed from business in the amount of $300.72, since it represents a loss incurred by Frances S. Ostler after the interlocutory decree of divorce.

(b) There is eliminated from your net income the loss of $3,100.00 claimed from sale of rental

property, since the property was the separate property of Frances S. Ostler.

(c) Salaries reported are decreased in the amount of $967.50 representing the community half of salary earned to February 27, 1950, date of interlocutory decree of divorce, which is income of Frances S. Ostler.

(d) Rental income reported in the amount of $213.00 is eliminated since it represents the separate income of Frances S. Ostler.

(e) You are allowed a standard deduction of $1,000.00 in lieu of $803.03 claimed in the return, or an increase of $196.97. Section 23(aa), I.R.C."

7. The petition claims the privilege of petitioner and Frances S. Ostler to file a joint return for the calendar year 1950 and, with respect to the adjustments made in the statutory notice of deficiency, assigns as error the elimination of the loss of $3,100 which had been claimed on the joint return as loss from the sale of rental property. The rental property which was sold at a loss was the separate property of Frances S. Ostler and, but for the availability of the filing of a joint return, the loss from the sale thereof could not be reflected to the tax advantage of petitioner, William G. Ostler.

8. The following is a full and exact copy of a letter dated May 13, 1954, written by petitioner to the Commissioner of Internal Revenue:

"Tucson, Arizona, May 13, 1954

"Commissioner of Internal Revenue

Chief Counsel, Internal Revenue Service

Mr. Daniel A. Taylor

Re: Docket No. 52,185 Ostler vs. Commission

Dear Mr. Taylor:

This is to acknowledge your letter of May 6, 1954. I have been out of town for a few days, hence the delay in my answering.

In relation to the contents of your letter and its notification I wish to state that I will be unable to participate in the trial and in lieu thereof do desire to have the case tried on a stipulation of facts and law.

It is my contention that a ruling, handed down March 11, 1953, by the Tax Court in an opinion by Judge Hall, Docket No. 32,823 in the case of Marriner S. Eccles vs. Commission, does apply to this case. I have been informed that this ruling of March 11, 1953 was appealed by the Commission and that the appeal has since been heard resulting in upholding of the opinion of Judge Hall. On this and other items to be considered I rest my case.

Most respectfully yours

W. G. Ostler, 2626½ East Glenn, Tucson, Arizona. Re: Docket No. 52185"

/s/ W. G. OSTLER,
Petitioner

/s/ JOHN POTTS BARNES REM
Chief Counsel, Internal Revenue Service

[Endorsed]: T.C.U.S. Filed June 23, 1955.

JOINT EXHIBIT A-1

(Copy) Tucson, Arizona, June 11, 1955

Mr. Melvin L. Sears

Dear Sir:

In reply to your letter of June 7th I am enclosing the original and copy of stipulation with my signature signed on the indicated lines as you requested. My position is much the same as stated in my letter to Mr. Daniel A. Taylor dated May 13th 1954. As much as I would like to, I will not, in fact, it is impossible for me to be present at the trial. I have suffered sever reverses and can not even pay an attorney to represent me.

As you will note there have been no changes in the stipulation and only one addition. In item No. 6 I added the words (on or about Mar. 13, 1951) I have no copy or exact information as to the date of the final papers but it was very near the above mentioned date.

Mr. Frank T. Hennessey Attorney of 11130 Mc-

Cormick St North Hollywood California filed the final papers. The Court was in the City of Los Angeles but I do not know the number.

I trust this information will help. In any case it is all I have.

I want to thank you for your consideration and wish you the very best of everything.

Yours very truly

W. G. Ostler

JOINT EXHIBIT B-2

20

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN

1950
CALENDAR YEAR

For other taxable years ending after Sept. 30, 1950, but before Dec. 31, 1951, attach Form 1040FY

Do not write in these spaces
Serial No. 3212697

(Cashier's Stamp)

EMPLOYEES: Instead of this form, you may use Form 1040A if your total income was less than $5,000, consisting wholly of wages shown on Forms W-2, or of such wages and not more than $100 of other wages, dividends, and interest.

Name William G. & Frances S. Ostler
(PLEASE PRINT. If this is a joint return of husband and wife use first names of both)

HOME ADDRESS [redacted] 5367 Sunline Ave
(PLEASE PRINT. Street and number or rural route)

Canoga Park, California
(City, town, or post office) (Postal zone number) (State)

Social Security No. 550-14-6019 Occupation Studio Dept. Head

15 1951

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (as defined in instructions) with 1950 gross income of less than $500 who received more than one-half of their support from you in 1950. If this is a joint return of husband and wife, list dependent relatives of both.

Name (please print)	Check below whether you (or your wife) were at the end of your taxable year— 65 OR OVER	BLIND	On lines a and b below— Write 1 if neither 65 nor blind; Write 2 if either 65 or blind; Write 3 if both 65 and blind.
Your name William G. Ostler	Yes ☐ No ☒	Yes ☐ No ☒	a. Number of exemptions for you 1
Wife's (or husband's) name Frances S. "	Yes ☐ No ☒	Yes ☐ No ☒	b. Number of her (his) exemptions 1

Name of Other Dependent Relative	Relationship	Address—If different from yours
Mary Jane Ostler	Daughter	

Enter here total number of exemptions claimed (yours and your wife's plus one for each dependent listed above) → 3

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1950. BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Also enter amount of income tax withheld. Members of Armed Forces and persons claiming traveling or reimbursed expenses, see instructions.

Print Employer's Name	Where Employed (City and State)	Amount of Income Tax Withheld	Total Wages
Paramount Pictures Corp.	Hollywood, Calif.	$ 1338 30	$ 10750 00
H. G. Steinwinter	La Jolla, "	53 60	468 00
	Enter totals...	$ 1391 90	$ 11218 00

3. If you received dividends, interest, or any other income, give details on page 2 and enter the total here 3187 72

4. Add income shown in items 2 and 3, and enter the total here $ 8030 28

IF YOUR INCOME WAS LESS THAN $5,000. Use the table on page 4 to find your tax—unless you itemize your deductions. This table allows about 10 percent of your total income for charitable contributions, interest, taxes, medical expenses, etc. If your deductions exceed 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF INCOME WAS $5,000 OR MORE.—Do not use tax table. Compute tax on page 3. Use standard deduction or itemize deductions, whichever is to your advantage.

HUSBAND AND WIFE.—For split-income benefits, file a joint return. If filing separate returns, and one itemizes deductions, both must itemize.

5. Enter your tax from table on page 4, or from line 18, page 3 $ 981 74

6. How much have you paid on your 1950 income tax?
(A) By tax withheld (in item 2, above). Attach Original Forms W-2. $ 1391 90
(B) By payments on 1950 Declaration of Estimated Tax
Enter total here → 1391 90

7. If your tax (item 5) is larger than payments (item 6), enter BALANCE OF TAX DUE here $
This balance of tax due must be paid in full with return.

8. If your payments (item 6) are larger than your tax (item 5), enter the OVERPAYMENT here $ 410 16
Enter amount of item 8 you want: Refunded to you $ 410.16; Credited on your 1951 estimated tax $
Do you own any prior year Federal tax for which you have been billed? No (Yes or No)

If filed a return for a prior year, state latest year 1949
Where filed Los Angeles
Which Collector's office did you pay amount claimed in item 6 (B), above?

County in which you reside Los Angeles
Is your wife (or husband) making a separate return for 1950? no (Yes or No)
If "Yes," write her (or his) name

Bookkeepers Business Service Co. Calif.
(Name of person, other than taxpayer, preparing this return) (Date)

Van Nuys
(Name of firm or employer, if any)

Under penalties of perjury, I declare that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

W. Williams G. Ostler 3-1-51
(Signature of taxpayer) (Date)

Frances S. Ostler 3-1-51
(Signature of taxpayer's wife or husband if this is a joint return) (Date)

To secure any benefits of split-income provisions, husband and wife must include all their income, and BOTH MUST SIGN, even though only one has income.

This schedule becomes a part of the Income Tax return of

WILLIAM G. & FRANCES S. OSTLER — Cafe (Type of Business)

6813 Topanga Canyon

Canoga Park, Calif.

PROFIT OR LOSS STATEMENT

TOTAL SALES		$ 6468.66
COST OF MERCHANDISE SOLD		
Opening Inventory	$	
Merchandise Purchased	$ 3874.91	
Total	$	
Ending Inventory	$	
COST OF MERCHANDISE SOLD		$ 3874.91
Gross Profit for 8/22 - 12/31/50		$ 2593.75
COST OF OPERATION		
Wages	$ 1072.59	
Rent, Gas, Electricity and Telephone	$ 855.25	
Gas, Oil and Delivery Expense	$ 25.21	
Insurance and Advertising	$ 106.69	
Taxes	$ 194.50	
Undistributed Expense	$ 70.04	
Maintenance & Repairs	$ 390.19	
Equipment stolen	$ 80.00	
	$	
TOTAL COST OF OPERATION		$ 2794.47
NET Before Depreciation		$ 200.72
Depreciation for Period		$ 100.00
NET Loss for the period of 8/22- 12/31/50		$ 300.72

BOOKKEEPERS
BUSINESS SERVICE COMPANY

Joint Exhibit B-2--(Continued)

RENTAL SCHEDULE TO BE ATTACHED TO THE 1950 RETURN OF

William G. & Frances S. Ostler

KIND OF PROPERTY	Amount Received	Depreciation	Repairs & Expenses	Net Profit
House & Lot	660.00	-0-	447.00	213.00
TOTAL				

EXPENSES ON RENTALS

Type of Expense	1	2	3	4	5	6
Roof Repairs						
Plumbing Repairs						
Electrical Repairs						
Misc. Repairs						
Painting						
Cleaning & Decor.						
Gardner						
Insurance						
Utilities						
Taxes	147.00					
Interest	300.00					
TOTAL EXPENSES	447.00					

CHEDULE TO BE ATTACHED TO THE 1950 U.S. INCOME TAX RETURN OF

William G. & Frances Ostler

1. Kind of property (if buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis for each parcel of land or other enumerated property	4. Depreciation allowed to end of year	5. Depreciation allowed (or allowable) in prior years	6. Depreciation sustained or other basis to be recovered	7. Estimated life used to compute (or depreciation) this year	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
ipment	8-50	1200.00	-0-	-0-	1200.00	8		100.00

Joint Exhibit B-2--(Continued)

(See instructions)		
	Total Miscellaneous Deductions	
	TOTAL DEDUCTIONS	$

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

Enter amount shown in item 4, page 1. This is your Adjusted Gross Income	$ 8030	28
Enter DEDUCTIONS. If deductions are itemized above, enter the total of such deductions. If adjusted gross income (line 1, above) is $5,000 or more and deductions are not itemized, enter the standard deduction of 10 percent of line 1, above, or $1,000, whichever is the lesser, or $500 if this is the separate return of a married person	803	03
Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$ 7227	25
Multiply $600 by total number of exemptions claimed in item 1, page 1. Enter total here	1800	00
Subtract line 4 from line 3. Enter difference here	$ 5427	25
6, 7, and 8 should be filled in ONLY by a single person or a married person making a separate return		
Use the tax rates shown on page 16 of Instructions to figure your tentative tax on amount shown in line 5 (if line 3, above, includes partially tax-exempt interest, see Instructions). Enter the tentative tax here	$	
If line 6 is (a) not over $400, enter 13% of amount on line 6		
(b) over $400 but not over $100,000, enter $52 plus 9% of the excess over $400		
(c) over $100,000, enter $9,016 plus 7.3% of the excess over $100,000		
Subtract line 7 from line 6. Enter the difference here. This is your combined normal tax and surtax	$	
9 to 12 should be filled in ONLY if this is a joint return of husband and wife		
Enter here one-half of amount on line 5, above	$ 2713	62
Use the tax rates shown on page 16 of Instructions to figure your tentative tax on amount shown in line 9 (if line 3, above, includes partially tax-exempt interest, see Instructions). Enter the tentative tax here	$ 557	00
If line 10 is (a) not over $400, enter 13% of amount on line 10	66	13
(b) over $400 but not over $100,000, enter $52 plus 9% of the excess over $400		
(c) over $100,000, enter $9,016 plus 7.3% of the excess over $100,000		
Subtract line 11 from line 10. Enter the difference here	$ 490	87
Multiply amount on line 12 by 2. Enter this tax here. This is your combined normal tax and surtax	$ 981	74
If alternative tax computation is made on separate Schedule D, enter here tax from line 12 on back of Schedule D	$	
If you used the standard deduction in line 2, disregard lines 15, 16, and 17, and copy on line 18 the same figure you entered on line 8, 13, or 14, whichever is applicable		
Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116) $		
Enter here any income tax paid at source on tax-free covenant bond interest		
Add the figures on lines 15 and 16 and enter the total here	$	
Subtract line 17 from line 8, 13, or 14, whichever is applicable. Enter difference here and in item 5, page 1. This is your tax	$	

16—00081-1

ORIGINAL REFUND HAS BEEN MADE -

Check No. 16217488 - 6-15-51

$410.16 plus $3.47 interest - total $413.63

per District Director's Office - Los Angeles.

C. Forcum
Appellate Div.
11-16-53

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket No. 52185

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

WILLIAM G. OSTLER,
Respondent on Review.

PETITION FOR REVIEW

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States in this proceeding on July 26, 1955 "that there is no deficiency in income tax for the calendar year 1950." This petition for review is filed pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

The respondent on review, William G. Ostler, an individual residing at 2626½ East Glenn Avenue, Tucson, Arizona, filed his Federal income tax return for the calendar year 1950, the taxable year here involved, with the former Collector of Internal Revenue at Los Angeles, California. Venue on appeal, therefore, lies in the United States Court of Appeals for the Ninth Circuit where this review is sought.

Nature of Controversy

The sole issue presented to and passed upon by

The Tax Court of the United States, and which was decided contrary to the Commissioner's determination, is whether the Commissioner erred in holding that the taxpayer respondent, William G. Ostler, had the right to file a joint Federal income tax return for the taxable year 1950 with his former wife, Frances S. Ostler, from whom he was divorced, an interlocutory decree of divorce having been obtained by Frances on or about February 27, 1950, which decree became final on or about March 13, 1951. A so-called joint Federal income tax return for the calendar year 1950 was filed by the respondent and his former wife on March 15, 1951. A deficiency in tax was determined by the Commissioner against the respondent on review, William G. Ostler, in the amount of $1,292.35, predicated on the disallowance of the right to file a joint return under Section 51(b) of the Internal Revenue Code of 1939 and the resultant reallocation of community income to separate incomes of the respondent and his former wife. The Tax Court of the United States disagreed with the Commissioner's determination and entered its decision of no deficiency as hereinabove indicated.

/s/ H. BRIAN HOLLAND,
Assistant Attorney General

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service
Attorneys for Petitioner on Review

[Endorsed]: T.C.U.S. Filed October 17, 1955.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS

Comes Now the petitioner on review herein, by his attorneys, H. Brian Holland, Assistant Attorney General, and John Potts Barnes, Chief Counsel, Internal Revenue Service, and hereby states that he intends to rely upon the following points in this proceeding:

The Tax Court of the United States erred:

1. In entering its decision "that there is no deficiency in income tax for the calendar year 1950."

2. In failing and refusing to sustain the deficiency in income tax determined by the Commissioner.

3. In holding and deciding that the taxpayer and his former wife, Frances S. Ostler, were husband and wife on December 31, 1950 and were entitled to file a joint Federal income tax return for the taxable year 1950.

4. In failing and refusing to hold and decide that the taxpayer and his former wife, Frances S. Ostler, who were legally separated (although not absolutely divorced) under an interlocutory decree of divorce on or about February 27, 1950, which decree became final on or about March 13, 1951, could not, within the meaning of Section 25(b)(2)(B) of the Internal Revenue Code of 1939, file a joint Federal income tax return for the taxable year 1950.

5. In holding and deciding that the taxpayer and

his former wife, Frances S. Ostler, were entitled to file a joint Federal income tax return for the taxable year 1950.

6. In that its opinion and decision are not supported by but are contrary to the facts as stipulated by the parties.

7. In that its opinion and decision are contrary to law and the Commissioner's regulations.

/s/ H. BRIAN HOLLAND,
Assistant Attorney General

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service

Attorneys for Petitioner on Review

Statement of Service attached.

[Endorsed]: T.C.U.S. Filed November 29, 1955.

The Tax Court of the United States

[Title of Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of The Tax Court of The United States, do hereby certify that the foregoing documents 1 to 13, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review" and "Supplemental Designation of Contents of Record on Re-

view" in the proceeding before The Tax Court of The United States entitled: "William G. Ostler, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 52185" and in which the respondent in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of The United States, at Washington, in the District of Columbia, this 14th day of December, 1955.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, The Tax Court of the
United States

[Endorsed]: No. 14984. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. William G. Ostler, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: December 27, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 14984

In the United States Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM G. OSTLER, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

CHARLES K. RICE,
Acting Assistant Attorney General.
LEE A. JACKSON,
ROBERT N. ANDERSON,
JOSEPH F. GOETTEN,
Attorneys, Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

In the United States Court of Appeals
for the Ninth Circuit

No. 14984

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM G. OSTLER, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 9-12) are not officially reported.

JURISDICTION

The Commissioner's petition for review (R. 25-26) involves an asserted deficiency of $1,292.35 in taxpayer's federal income tax for the year 1950. On December 14, 1953, the Commissioner mailed a notice of such deficiency to the taxpayer. (R. 3, 5-6.) Within 91 days thereafter (the 90th day being on Sunday), or on March 15, 1954, the taxpayer, pursuant to Section 272 of the Internal Revenue Code of 1939, filed a peti-

tion in the Tax Court for redetermination of this deficiency. (R. 1, 3-4.) On July 26, 1955, the decision of the Tax Court was entered deciding that there was no deficiency. (R. 2, 13.) On October 17, 1955, the Commissioner filed his petition for review invoking the jurisdiction of this Court under Section 7482 of the Internal Revenue Code of 1954. (R. 2, 25-26.)

QUESTION PRESENTED

Whether under Section 51 of the Internal Revenue Code of 1939 the taxpayer and his former wife were entitled to file a joint income tax return for the year 1950, notwithstanding the fact that as of December 31, 1950, they were legally separated under an interlocutory decree of divorce.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 51. INDIVIDUAL RETURNS.
>
> (b) [As amended by Sec. 303, Revenue Act of 1948, c. 618, 62 Stat. 110] *Husband and Wife.*—
>
> (1) *In general.*—A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.
>
> * * * * *

(5) *Determination of status.*—for the purposes of this section—

(A) the status as husband and wife of two individuals having taxable years beginning on the same day shall be determined—

(i) if both have the same taxable year—as of the close of such year; and

(ii) if one dφes before the close of the taxable year of the other—as of the time of such death; and

(B) an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

* * * * *

(26 U. S. C. 1952 ed., Sec. 51.)

STATEMENT

The facts as stipulated (R. 13-24) and found by the Tax Court (R. 9-10) may be summarized as follows:

The taxpayer, William G. Ostler, is an individual with residence at Tucson, Arizona. (R. 9.) On or about February 27, 1950, the taxpayer's wife, Frances S. Ostler, secured an interlocutory decree of divorce from him. This decree became final on or about March 13, 1951. (R. 9, 10)

Prior to the calendar year 1950, during that year, and for a period of time thereafter, both taxpayer and Frances were domiciled in and residents of the State of California. (R. 9-10.)

On March 15, 1951, the taxpayer and Frances filed a joint income tax return for 1950, with the Collector

of Internal Revenue at Los Angeles, California. In this return a total of three exemptions was claimed, one for each of the principal taxpayers and one for a daughter, Mary Jane Ostler. The items respecting income, deductions, and losses stated and claimed in this joint return were computed and reported upon the community property basis. Taxpayer and Frances each had individual sources of income from their labor and ownership of productive property and property rights. (R. 9, 20-24.)

On December 14, 1953, a statutory notice of deficiency in the amount of $1,292.35, for the calendar year 1950, was mailed to the taxpayer. This deficiency resulted from a reallocation of community income to separate incomes of taxpayer and Frances. The basis for the adjustments making up the deficiency was that, under the provisions of Section 51(b) of the Internal Revenue Code of 1939, taxpayer and Frances could not file a joint return for the taxable year ended December 31, 1950, since the interlocutory decree of divorce was granted on February 27, 1950. (R. 10.)

In deciding that there was no deficiency, the Tax Court held that, notwithstanding the interlocutory decree of divorce, the taxpayer and Frances were entitled to file a joint return for the year 1950. (R. 10-12.)

STATEMENT OF POINT TO BE URGED

The Tax Court erred in holding that the taxpayer and his former life, who as of December 31, 1950, were legally separated under an interlocutory degree of divorce, were entitled to file a joint income tax return for the year 1950.

SUMMARY OF ARGUMENT

Section 51(b)(5)(B) of the Internal Revenue Code of 1939 provides that for the purpose of filing a joint income tax return an individual shall not be considered married if at the close of the year he is "legally separated from his spouse under a decree of divorce or of separate maintenance." The sole question in this case is whether the taxpayer and his former wife were entitled to file a joint income tax return for the year 1950, notwithstanding the fact that as of the close of that year they were legally separated under an interlocutory decree of divorce. The Tax Court concluded that the taxpayer and his former wife were entitled to file a joint return, pointing out that under local law a marriage is not terminated by an interlocutory decree of divorce. We submit that the question presented here depends upon construction of a federal statute which covers situations where the marriage is not, as well as situations where the marriage is, terminated under local law, and that the terms of that statute and its legislative history, as well as a long-standing administrative construction, make it clear that under the circumstances of this case the legal separation of the taxpayer and his former wife deprived them of the privilege of filing a joint return.

ARGUMENT

The Tax Court Erred in Holding that the Taxpayer and His Former Wife Were Entitled to File a Joint Income Tax Return for the Year 1950

Paragraph (1) of Section 51(b) of the Internal Revenue Code of 1939, *supra,* provides that a single return may be filed jointly by a husband and wife. For

the purposes of this section, paragraph (5) further provides that, with exceptions not relevant here, the status of husband and wife shall be determined as of the close of the year but that——

> * * * an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

The single question presented in the instant case is whether under this section the taxpayer and his former wife were entitled to file a joint income tax return for the year 1950, notwithstanding the fact that as of the close of that year they were legally separated under an interlocutory decree of divorce. Relying upon its prior decisions in *Eccles* v. *Commissioner,* 19 T.C. 1049, affirmed *per curiam,* 208 F. 2d 796 (C.A. 4th), and *Evans* v. *Commissioner,* 19 T.C. 1102, affirmed, 211 F. 2d 378 (C.A. 10th), the Tax Court concluded that the taxpayer and his former wife were entitled to file a joint return, pointing out that under local law the status of husband and wife is not terminated by an interlocutory decree of divorce. We submit that the question presented here depends upon construction of a federal statute which covers situations where the marriage is not, as well as situations where it is, terminated under local law, and that the terms of that statute and its legislative history, as well as a long-standing administrative construction, make it clear that under the circumstances of this case the legal separation of the taxpayer and his former wife deprived them of the privilege of filing a joint return.

Since the privilege of filing a joint return was conferred, in the first instance, only upon husband and

wife, it was not necessary for Congress to provide that that privilege could not be exercised where the marriage had been terminated. Moreover, the statutory language itself shows beyond doubt that it is not necessary that the marriage of individuals be terminated before they forfeit the privilege of filing a joint return. Thus, that privilege is forfeited by "an individual who is legally separated from his spouse under a decree * * * of separate maintenance," a decree which confirms rather than terminates the marriage. The crucial term "legally separated," is used with respect to both a decree of divorce and a decree of separate maintenance. Indeed, it would have been inconsistent and arbitrary to provide that the privilege of filing a joint return should be forfeited by individuals legally separated under a decree of separate maintenance notwithstanding the fact that their marriage is not terminated under local law, and at the same time to provide that such privilege should not be forfeited by those individuals legally separated under a decree of divorce if their marriage is not terminated under local law. Furthermore, in the statutory provision that the individual shall not be considered married for purposes of the joint return privilege if he is legally separated "under a decree of divorce", the term "decree of divorce" is not qualified. It is not provided that he must be legally separated under any particular type of decree of divorce or that an interlocutory decree of divorce shall not be considered a decree of divorce. Accordingly, to adopt the holding of the Tax Court is both to impute inconsistent, arbitrary intentions to Congress and to read into the statute something which is not there.

The legislative history of 1939 Code Section 51(b)

confirms the conclusion that in speaking of "an individual who is legally separated from his spouse under a decree of divorce" Congress did not intend merely to cover situations where the marriage was terminated, i.e., where there had been an absolute divorce. Thus, in referring to the adoption of this language in 1939 Code Section 23(aa) (26 U.S.C. 1952 ed., Sec. 23), relating to the standard deduction,[1] as well as in 1939 Code Section 51(b), relating to joint returns, the Senate Finance Committee stated (S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 55, 58 (1948-1 Cum. Bull. 285, 328, 330)):

* * * * *

> The new paragraph (6) contains provisions substantially the same as those contained in the last sentence of section 23(aa)(4) of existing law relating to the determination of the status of individuals as husband and wife. Under this paragraph the determination of whether an individual is married is made, for the purpose of the allowance of the standard deduction, as of the close of his taxable year, unless his spouse dies during his taxable year, in which case the determination is made as of the time of such death. The new paragraph (6) also provides that for the purpose of the allowance of the standard deduction, an individual legally separated (*although not absolutely-divorced*) from his spouse under a decree of divorce or separate maintenance shall not be considered

---

[1] Not only was similar language used in various provisions of the 1939 Code, but it was expressly declared that a uniform construction of those provisions was intended. S. Rep. No. 1013, 80th Cong., 2d Sess., p. 50 (1948-1 Cum. Bull. 285, 324).

married. This is the same test as is provided in section 22(k) of the Code, relating to alimony and like payments, where spouses are *legally separated or divorced.* This provision is also intended to apply the same test as is provided in section 51(b) of the Code, as proposed to be amended by section 303 of the bill, so that the determination of married individuals will be the same for the purpose of the standard deduction as for the purpose of eligibility to make a joint return. (Emphasis added.)

* * * * *

Paragraph (5), of section 51(b) as amended in the bill, provides for the determination of status of individuals for the purpose of making joint returns. In accordance with the extension of the joint return privilege to cases in which a spouse died during the taxable year, the status determination of individuals as husband and wife in such a case is to be made as of the time of the death of such spouse. In this and in other respects the determination of status for the purpose of section 51 is the same as that provided under section 23(aa)(6), as added by section 302 of the bill with respect to the allowance of the standard deduction, except that the determination of status applies under section 51 only where two individuals have taxable years beginning on the same day.

* * * * *

A consistent and long-standing administrative construction has recognized that the statutory language "legally separated * * * under a decree of divorce,"

includes a legal separation under an interlocutory decree of divorce. Thus, in I.T. 3761, 1945 Cum. Bull. 76, the Commissioner ruled that periodic payments made pursuant to an interlocutory decree of divorce in the State of California by a husband for the support of his wife are includible in her gross income under Section 22(k) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 22) and are deductible by the husband under Section 23(u). I.T. 3942, 1949 Cum. Bull. 69, holds that for the purposes of Sections 23(aa), 25(b), and 51(b) of the Internal Revenue Code the parties named in an interlocutory decree of divorce in the State of California are not "considered" as married because of the legal separation. See also I.T. 3934, 1949 Cum. Bull. 54, I.T. 3944, 1949 Cum. 56 and Rev. Rul. 55-178, 1955-1 Cum. Bull. 322. The Commissioner's position in this case and in the above rulings is urged with a view to the symmetry and over-all equity of the revenue laws.

While most of the opinion of the Tax Court in *Eccles* v. *Commissioner, supra,* was devoted to a discussion of the fact that under local law a marriage is not terminated by an interlocutory decree of divorce, that court did make two other observations which deserve some comment.[2] First, that court attempted (p. 1054) to draw an analogy between the order for alimony *pendente lite* and an interlocutory decree of divorce. But the statutory language refers to "a decree of divorce or of separate maintenance" and an order for alimony

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[2] The Tax Court also referred to language in the Treasury Regulations dealing with the tax treatment of alimony payments. This language, however, was contained in certain examples which did not purport to be all-inclusive.

pendente lite clearly is neither. Second, the Tax Court suggests (pp. 1053-1054) that the statutory language here in issue should be construed consistently with the language of the estate tax "marital deduction" provision contained in 1939 Code Section 812(e) (26 U.S.C. 1952 ed., Sec. 812.) But, the legislative history of the provisions of Section 812(e) manifests an opposite Congressional intent. Thus, while, as we have previously shown, Congress intended the statutory language "legally separated * * * under a decree of divorce or of separate maintenance," as used in 1939 Code Section 51(b) (and in certain other enumerated sections not including Section 812(e)), to apply to individuals "although not absolutely divorced," the Senate Finance Committee explained its use of the term "surviving spouse" in Section 812(e) as follows (S. Rep. No. 1013, part 2, 80th Cong., 2d Sess., pp. 6-7 (1948-1 Cum. Bull. 331, 335)):

> A legal separation which has not (at the time of the decedent's death) *terminated the marriage* does not affect such status for the purposes of Section 812(e)(1). (Emphasis added.)

On the other hand, a legal separation under a decree of divorce or of separate maintenance does affect the status of a taxpayer as far as being "considered" married under Section 51(b) and the other certain other enumerated sections is concerned.

CONCLUSION

The decision of the Tax Court is incorrect and should be reversed.

Respectfully submitted,

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MARCH, 1956.

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No. .....

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GREAT LAKES AIRLINES, INC., a corporation, and CURREY AIR TRANSPORT LIMITED, a corporation,

Petitioners,

vs.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES OF AMERICA,

Respondent.

Petition for Review of Order of the Civil Aeronautics Board of the United States of America.

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vs.

CIVIL AERONAUTICS BOARD OF THE UNITED STATES OF AMERICA,

Respondent.

Petition for Review of Order of the Civil Aeronautics Board of the United States of America.

To the Judges of the United States Court of Appeals for the Ninth Circuit:

The petition of Great Lakes Airlines, Inc., a corporation, and Currey Air Transport Limited, a corporation, respectfully shows to the court as follows:

Nature of the Proceedings.

The order which petitioners seek to have reviewed here[1] was adopted and issued by the Civil Aeronautics Board during the course of a proceeding entitled, "In the Matter of the Investigation of Air Services by Large Irregular Carriers and Irregular Transport Carriers, Docket 5132."

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[1]Order No. E-9814, dated December 7, 1955; Appendix, Exhibit "A".

The proceeding in Docket 5132 was instituted in 1951,[2] and hearings commenced during 1952 in Washington, D. C.

The parties in the case consist of approximately sixty air carriers holding Letters of Registration from the Civil Aeronautics Board, designated Large Irregular Carriers and Irregular Transport Carriers[3] and approximately thirty intervenors consisting of air carriers holding certificates of public convenience and necessity from the Civil Aeronautics Board (herein referred to as the "Board"), railroad common carriers, and other interested parties. Bureau Counsel of the Bureau of Air Operations of the Board is also a party.

Petitioners are parties in Docket 5132 and hold Letters of Registration from the Board. Petitioners have actively participated in the proceeding since it was instituted. Considering the number of parties involved, the complexity of the issues, the size of the record, and the duration of the proceeding to date, Docket 5132 is the largest proceeding ever to come before the Board. Lengthy and repeated hearings have been held in Washington, D. C., Miami, Florida, Los Angeles, California, and Seattle, Washington, since the hearings commenced in September, 1952.

Petitioners have participated in five separate hearing sessions in Washington, D. C. and three separate hearing sessions in Los Angeles in this proceeding. The actual time spent by petitioners at these hearings in constant

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[2]Order No. E-5722, dated September 21, 1951; Appendix, Exhibit "B".

[3]Pursuant to Order No. E-9744, dated November 15, 1955, these carriers are now scheduled air carriers designated as Supplemental Air Carriers.

daily attendance approximates seven and one-half months. This does not include time spent in preparing exhibits and in other preparations for the hearings.

The record in Docket 5132 is now in excess of 30,000 pages, and the record is not yet closed. The exhibits received in evidence total in the thousands of pages.

In January, 1954, the Board radically altered the procedure in Docket 5132 by purportedly severing the public interest issues from the qualification issues, ordering the hearings to reconvene on the public interest issues and deferring further hearings on the qualification issues until after the Board had decided the public interest issues.[4]

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[4]Order No. E-8052, dated January 20, 1954; Appendix, Exhibit "C". Petitioners and numerous other parties, including the intervenors, filed petitions for reconsideration of this order, which petitions were denied by the Board in Order No. E-8244, dated April 12, 1954. Petitioners' objections to Order No. E-8052 are partially summarized in the following excerpts from the Petition for Reconsideration of Order No. E-8052 filed by petitioners on February 15, 1954:

> "The Irregular Air Carrier Investigation, Docket 5132, *et al.*, was instituted by order of the Board, serial No. E-5722, dated September 21, 1951, as amended. This proceeding was in turn the outgrowth of previous prolonged unsuccessful attempts by the Board to reach a decision with respect to the issues surrounding the Large Irregular Air Carriers. (*e.g.* The Transcontinental Coach-type Service Case, Docket 3397.) The current investigation in Docket 5132 has continued from September, 1952, except for short periods of recess. During this period the testimony of witnesses for the applicants and interveners has swelled the transcript to an incredible 26,000 pages. The exhibits thus far submitted are thousands of pages in number. The testimony and exhibits received in evidence to date have covered every conceivable aspect of public interest and public convenience and necessity, as well as the fitness, willingness and ability of the individual applicants whose cases have been presented. The cost to the applicants in this proceeding and the proceeding from which Docket 5132 evolved must be measured literally in the millions of dollars. This enormous cost to the applicants for the

Thereafter, the hearings were resumed for the purpose of receiving additional evidence on the public interest questions. Upon the close of this phase of the hearings the parties submitted briefs to the Hearing Examiners, the Examiners rendered their initial decision, the parties submitted briefs to the Board, the Board then heard oral argument from the parties, and, finally, the Board rendered its decision on the public interest questions.

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preparation and prosecution of their interests in these proceedings does not reflect the indirect expenses attributable to these proceedings. Nor does the cost reflect the dismay, frustration, exasperation and futility realized by the applicants thus far in striving to secure some determination by the Board of the issues facing it with respect to the Large Irregulars.

"At this date after seventeen months in hearing, Docket 5132 is probably not more than half way through the *hearing stage*. Approximately thirty applicants have not yet presented their cases. Conservative estimates indicate that if the hearing in Docket 5132 is ever completed, the transcript will exceed 50,000 pages, while the exhibits received in evidence will rival the size of the transcript in total number of pages.

"Distant as the final decision may have been under the original Board order instituting this proceeding, traditional concepts of fairness, equity and due process dictate that no change in the proceeding at this late date should be made where the effect of such change is unnecessarily to prolong the proceeding, to increase the expense to the applicants in the proceeding, to create confusion and uncertainty as to methods or procedure, or to jeopardize the rights of the applicants in any way whatsoever. . . .

"As to whether or not Board order E-8052 will expedite Docket 5132 in terms of time consumed in hearing, the opinion of Board members Lee and Adams in their dissenting opinion to order No. E-5082, and United Air Lines' Petition for Reconsideration of said order fully set forth the reasons why the hearings will not be expedited, and in fact may be prolonged further. It is clear that the order will not expedite the proceeding unless the Board categorically denies that any public need exists for the Large Irregulars."

At this time, *two years* after the issuance of Order No. 8052 for the purpose of "expediting" the proceeding, the hearings in Docket 5132 are still in session in Washington, and the proceeding has not even reached the stage of filing briefs to the Examiners on the qualifications questions respecting individual carriers.

Prior to the Board's decision the Board issued an order[5] vacating the Examiners' findings with respect to the qualifications of applicants already heard and reopening the record on the sole question of the qualifications of the applicants. Hearings on the qualifications of the applicants who had not been heard were ordered to be scheduled.

Thereafter various parties who had previously presented evidence on their qualifications petitioned the Board to present additional evidence concerning changes in their qualifications which had occurred since their previous presentations. Petitioner Great Lakes Airlines, Inc. filed such a petition on September 1, 1955. The Board viewed the petitions favorably and issued an order reopening the record to permit petitioner Great Lakes Airlines, Inc., and other parties,

> "to present additional evidence concerning *changes in qualifications which have occurred since the presentation of evidence on that issue.*"[6] (Italics added.)

Following this order, Petitioner Great Lakes Airlines, Inc. participated in additional hearings scheduled by the

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[5]Order No. E-9503, dated August 19, 1955; Appendix, Exhibit "D". This order vacating the Examiners' findings with respect to the qualifications of applicants already heard was made necessary by reason of the failure of the Examiners to follow the Board's Order No. E-8052. In utter and complete disregard of Order No. E-8052, severing the public interest questions from the qualifications questions and deferring the decision on the qualifications of individual applicants until after the decision by the Board on the public interest questions, the Examiners proceeded to spend months deciding the qualifications questions and preparing findings and lengthy summaries of evidence with respect to the individual applicants. All of this was vacated and rendered useless by the Board in Order No. E-9503. As a result, eight months or more were completely wasted insofar as the parties were concerned and the final decision has been unnecessarily delayed by the amount of time wasted.

[6]Order No. E-9584, dated September 22, 1955; Appendix, Exhibit "E".

Examiners and presented evidence in Docket 5132 in Washington, D. C. during October, 1955, and in Los Angeles during November, 1955.

At the reopened hearing in Washington in October, 1955, held pursuant to Order No. E-9584, petitioner Great Lakes Airlines, Inc. presented additional evidence concerning changes in its qualifications which had occurred since the prior presentation of evidence on its qualifications was made in 1953.

On October 12, 1955, American Airlines, Inc., an intervenor in Docket 5132, offered in evidence an exhibit[7] which purported to contain references to the record in another proceeding before the Board.[8] The offer by American was made as part of American's rebuttal to the evidence presented by petitioner Great Lakes. The references to the record in Docket 6908, contained in American's offered exhibit, related to the testimony of one Malcolm G. Robertson, given by Robertson in Docket 6908 on January 31, 1955.

Robertson's testimony in Docket 6908, portions of which American sought to have incorporated by reference in Docket 5132 by means of its offered exhibit, related to events and conversations which occurred in 1951, and were allegedly participated in by Robertson, by Robert M. Smith, then vice-president of petitioner Currey Air Transport Limited, and Irving E. Hermann, president of petitioner Great Lakes.

The subject of Robertson's testimony in Docket 6908 was covered exhaustively in Docket 5132 during the course of hearings held in Los Angeles in 1953, at which time

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[7]Exhibit AA-520; Appendix, Exhibit "F".

[8]Docket 6908, known as the "Skycoach Enforcement Case."

petitioners first presented evidence on their qualifications. The Los Angeles hearings of petitioners' cases in 1953 were in session continuously during October, November and part of December. Over 4,000 pages of the record were covered by petitioners' cases, including the rebuttal evidence presented by the intervenors. Voluminous exhibits were received in evidence during this period.

A large portion of the time was consumed by the intervenors and Bureau Counsel in exploring the alleged relationship between petitioners Great Lakes and Currey. The events and conversations testified to by Robertson in Docket 6908 in 1955, were covered in great detail in Docket 5132 in 1953. Although Robertson did not testify in Docket 5132 in 1953, his participation in the events and conversations being investigated was known to all parties as early as October 15, 1953.[9] Robertson was available as a witness at that time and could have been called by any party desiring his testimony during that session of the hearings or at later sessions.

Petitioner Great Lakes objected to the admission of American Airlines' proposed Exhibit AA-520 in the Washington session of the hearings in October, 1955, on the grounds: (1) that the testimony of Robertson in Docket 6908 relating to events and conversations which occurred in 1951 lay outside the scope of the proceeding in Docket 5132 as defined by Order No. E-9584, dated September 22, 1955,[10] which said order reopened the record solely for the purpose of taking evidence on *changes* in qualifications of applicants *which had occurred since their previous presentations on that issue,* and (2) that

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[9]Transcript in Docket 5132; page 22,591.

[10]Appendix, Exhibit "E".

American had failed to establish a proper predicate for the introduction of its proffered exhibit.

The Examiners sustained the objection of petitioner Great Lakes to the admission of American exhibit AA-520 on the ground that the testimony of Robertson lay outside the scope of the reopened proceeding as defined in Order No. E-9584. American requested permission to appeal the ruling of the Examiners to the Board and the Examiners granted American's request.[11]

American filed its appeal from the ruling of the Examiners with respect to the admissibility of exhibit AA-520 and coupled the appeal with an "Alternative Motion for a Limited Reopening of Proceeding." American requested the Board to: (1) reverse the Examiners' ruling appealed from, or (2) in the alternative to modify its order reopening the proceeding in Docket 5132 with respect to Great Lakes Airlines, Inc., to the limited extent necessary to permit introduction of the Robertson testimony.

Petitioner Great Lakes filed a brief in opposition to American's appeal on November 3, 1955, contending that the testimony of Robertson concerning events which occurred in 1951, two years prior to the hearings in 1953 when petitioners first presented evidence in Docket 5132 on the same subjects, lay outside the scope of the proceeding reopened solely for the purpose of receiving evi-

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[11]Under Section 302.18 of the Board's Rules of Practice in Economic Proceedings (14 C. F. R. 302.18), permission from the Examiner is required before a ruling of the Examiner during the course of a proceeding may be appealed to the Board.

dence of *changes* in qualifications *which had occurred since the last presentation by Great Lakes.*

On December 7, 1955, the Board adopted Order No. E-9814[12] denying American's appeal and affirming the ruling of the Examiners on the ground that the evidence of Robertson's testimony sought to be introduced is beyond the scope of the reopened hearing as defined by the Board's previous Order No. E-9584.[13] The Board then ordered:

> "1. That American's appeal from the Examiners' ruling be and it is hereby denied.
>
> "2. *That the record herein be and it is hereby reopened to explore the relationship, if any, direct or indirect, between Great Lakes and Currey.*" (Italics added.)

Paragraph 2 of Order No. E-9814 is the subject of this petition for review. This paragraph is not based upon any evidence of record in Docket 5132 or any other proceeding before the Board. There is nothing before the Board or within the Board's knowledge, official or otherwise, upon which this order is based.

By Notice to All Parties, dated December 9, 1955,[14] the Examiners notified petitioners that the hearing of evidence on the relationship between Great Lakes and Currey under Order No. E-9814, would commence on January 4, 1956, in Washington, D. C.

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[12]Appendix, Exhibit "A".

[13]Appendix, Exhibit "E".

[14]Appendix, Exhibit "G".

Petitioners Great Lakes and Currey filed a Petition for Reconsideration of Order No. E-9814 on December 16, 1955,[15] setting forth petitioners' grounds for requesting the following relief in said petition:

> "(1) That the Board reconsider Order No. E-9814 and reverse paragraph (2) of said Order reopening the record;
>
> "(2) That if the Board does not reverse said order as requested, that the Board issue an order clarifying Order No. E-9814, limiting the scope of any reopened proceeding to the taking of the oral testimony of Malcolm G. Robertson, and any cross-examination and rebuttal in connection therewith;
>
> "(3) That the Board stay the hearing in Docket 5132 with respect to these Petitioners now set for 10:00 A.M., January 4, 1956, in Washington, D. C., pending the Board's decision on this Petition;
>
> "(4) That any hearing held pursuant to Order No. E-9814 or any further order be held in Los Angeles, California, with respect to these Petitioners;
>
> "(5) That the Board make an immediate decision on this Petition in order to allow Petitioners sufficient time to seek judicial review in accordance with Section 1006 of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. A. 646);
>
> "(6) For such other and further relief as may be just and proper."

The Board denied the petition for reconsideration on December 23, 1955.[16]

The commencement of the hearings on the alleged relationship between petitioners Great Lakes and Currey has

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[15]Appendix, Exhibit "H".

[16]Order No. E-9871; Appendix, Exhibit "I".

now been postponed at the request of petitioners from January 4, 1956, and the hearings are now scheduled to commence on or about January 17, 1956.[17] Petitioners requested a postponement in order to permit them to file this petition and have a motion for stay heard prior to the commencement of the hearings.

Petitioners, by virtue of this petition, seek to have paragraph 2 of Order No. E-9814 set aside and annulled, and further seek to have said order stayed pending final determination of this petition.

Jurisdiction and Venue.

This court is given jurisdiction to review the order in question herein by the provisions of the Civil Aeronautics Act of 1938, as amended, Section 1006; 49 U. S. C. 646.

Petitioners have their principal places of business in the State of California, within this judicial circuit.

Grounds on Which Relief Is Sought.

Petitioners, as a basis for review of paragraph 2 of Board Order No. E-9814, rely upon the following grounds:

1. The Board's order is contrary to the law and is not supported by any substantial evidence.

2. The Board's order is arbitrary, unreasonable and capricious in that it compels petitioners, as parties in Docket 5132, to submit to lengthy and complex hearings without reason or basis in fact or law.

---

[17]Telegram from Examiner Wiser, dated December 29, 1955; Appendix, Exhibit "J".

3. The Board's order is arbitrary, unreasonable and capricious in that it compels petitioners, as parties in Docket 5132, to submit to the same lengthy and complex hearings twice in the same proceeding on identical issues without reason or basis in fact or law.

4. The Board's order subjects petitioners to unequal, unfair and discriminatory treatment with respect to other parties in the same proceeding similarly situated, in that said order, contrary to and inconsistent with existing Board orders, singles out petitioners from some sixty Supplemental Air Carriers and requires petitioners alone to submit to additional protracted hearings on matters already covered exhaustively without reason or basis in fact or law.

5. The Board's order will result in irreparable damage to petitioners caused by a disruption of their business for an indefinite period, an additional and wholly unnecessary crushing burden of expense, and loss of public and employee goodwill.

6. The Board's order violates due process as to petitioners under the Constitution of the United States and the Administrative Procedure Act, 5 U. S. C. 1001, *et seq.*, for the reasons stated above.

7. The Board's order is an abuse of discretion amounting to prejudicial error for all of the reasons stated above.

8. The Board's denial of petitioners' petition for reconsideration of said order is an abuse of discretion, is contrary to law and is not supported by any substantial evidence.

9. Petitioners have no adequate legal remedy.

The Relief Prayed.

Wherefore, petitioners pray that this Court review the order of the Civil Aeronautics Board complained of, and:

1. That paragraph 2 of said Order No. E-9814 be set aside and annulled;

2. That said Order be stayed pending final determination of this petition, and for such other and further relief as to the Court may seem just.

KEATINGE AND OLDER,
By CHARLES H. OLDER,
Attorneys for Petitioners.

APPENDIX.

Exhibit "A."

Order No. E-9814

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 7th day of December, 1955.

In the matter of the Large Irregular Air Carrier Investigation. Docket No. 5132, *et al.*

ORDER DENYING APPEAL AND ENLARGING SCOPE OF HEARING.

This matter comes before the Board on the appeal of American Airlines, Inc. (American) from the ruling of Examiners Ralph L. Wiser and Richard A. Walsh, made in the reopening hearing on the qualifications of Great Lakes Airlines, Inc. (Great Lakes), refusing the admission into evidence of an exhibit offered by American. The exhibit consists of excerpts from the transcript in the *Skycoach Enforcement Case,* Docket No. 6908, purporting to be portions of the testimony of one Malcolm G. Robertson, who testified in that proceeding on January 31, 1955. It was offered by American under Rule 24(i) of the Rules of Practice in rebuttal to Great Lakes' case. Upon objection by Great Lakes, the Examiners ruled that since the matters contained in the exhibit related to events alleged to have occurred in 1951, the evidence was beyond the scope of the reopened hearing which by Order No. E-9584, adopted September 22, 1955, is limited to "changes in qualifications which have occurred since the presentation of evidence on that issue with respect to * * *

Great Lakes." The Examiners did not reach the issue whether Robertson's testimony is admissible in the form presented.

Upon consideration of American's appeal and great Lakes' brief in opposition, the Board concludes that the evidence sought to be introduced is beyond the scope of the reopened hearing on Great Lakes' qualifications as defined in the Board's previous order. The Examiners' ruling should therefore be affirmed and the appeal denied.

However, American's appeal is coupled with an alternative request that the proceeding be reopened for the limited purpose of receiving Robertson's testimony. We find merit in this request. In view of the fact that Robertson's testimony, if credited, raises a question of a possible violation of Sections 408 and 409 of the Act by persons holding the controlling stock interest in Great Lakes and may affect the credibility of testimony offered by Great Lakes in the prior hearing as to its qualifications, the Board concludes that it is in the public interest to reopen the proceeding for the purpose of exploring the relationship, if any, direct or indirect, between Great Lakes and Currey Air Transport, Ltd. (Currey).

It Is Therefore Ordered:

1. That American's appeal from the Examiner's ruling be and it is hereby denied.

2. That the record herein be and it is hereby reopened to explore the relationship, if any, direct or indirect, between Great Lakes and Currey.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary.

(Seal)

Exhibit "B."

Provisions of Order No. E-5722 Dated September 21, 1951, as Amended by Order No. E-5814 Dated October 25, 1951, Order No. E-6017 Dated January 8, 1952, and Order No. E-6184 Dated March 6, 1952.

Order Instituting Investigation.

Although from time to time since the adoption of the original "non-scheduled" exemption in 1938 the Board has considered the status of irregular transport operations in rule making and other proceedings and has altered the conditions under which such services could be conducted, no formal investigation involving hearings with respect to the services performed by the Irregular Air Carriers and Irregular Transport Carriers has occurred since the issuance of the Board's opinion on May 17, 1946, in Docket No. 1501 (6 C.A.B. 1049). In the interim, there have been numerous and significant changes in conditions affecting air transportation and the place of noncertificated operations in the air transportation system. It therefore appears to be desirable to institute a general investigation to obtain further and current economic and other information concerning noncertificated operations in order that the Board may determine its future policy with respect to Large Irregular Carriers and the Irregular Transport Carriers.

In addition to the foregoing, at the present time there are on file with the Board numerous applications, filed by the existing Large Irregular Carriers pursuant to Section 291.16 of the Board's Regulations, requesting individual exemption orders relieving such carriers from the provisions of section 401 of the Act which prevent such carriers

from engaging in irregular air transportation. Moreover, some of the Irregular Transport Carriers who have already received individual exemption orders as a result of Board approval of their individual exemption applications filed pursuant to Section 291.16 have requested reconsideration or modification of the terms and conditions of such orders, particularly with respect to the so-called 3- and 8-trip limitation in such orders. Since many of these applications and requests raise common or related issues of both law and fact, it would be advantageous and conducive to the proper dispatch of business and to the ends of justice to consolidate them into one proceeding. In addition, the applications of the Irregular Transport Carriers should be reopened and consolidated with this proceeding in order that the conclusions of policy formulated by the Board in this proceeding may be made applicable, if that be deemed appropriate, to the Irregular Transport Carriers.

Accordingly, It Is Ordered:

1. That an investigation be and it hereby is instituted by the Board into all matters relating to and concerning air transportation conducted by (a) all Large Irregular Carriers as defined by Part 291 of the Board's Economic Regulations, who hold effective Letters of Registration on the date of adoption of this order (including Modern Air Transport, Inc.), and (b) all Irregular Transport Carriers to whom individual exemption orders have been issued exempting them from the provisions of section 401 insofar as such provisions would otherwise prevent them from engaging in air transportation on an irregular and infrequent basis, such investigation to include an inquiry into the following issues:

(1) Is there a need for air transportation services by the Large Irregular Carriers and Irregular Transport Carriers in addition to and supplemental to services performed by the carriers holding certificates of public convenience and necessity (hereinafter called the "certificated carriers").

(2) If the answer to the foregoing issue is in the affirmative, what type or types of such supplemental services would be best adapted to the performance of the transportation service required to meet the need. In this connection, the following will be considered:

a. Geographical distribution.

b. Frequency and degree of irregularity.

c. Types of traffic to be carried, i.e., persons, property, and mail.

d. Relative price of service.

e. Character of obligations to the public.

(3) What would be the effect of such supplemental services on the air transportation system and are such services in the public interest? Would such services:

a. Encourage and promote the development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense.

b. Promote the regulation of air transportation in such manner as to recognize and preserve the inherent advantages in such transportation.

c. Promote adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue prefer-

ences or advantages, or unfair or destructive competitive practices.

d. Foster sound economic conditions in air transportation.

e. Constitute the type of competition that would assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic service of the United States, of the Postal Service, and of the national defense.

f. Promote the regulation of air transportation to improve the relations between, and coordinate transportation by, air carriers.

g. Promote the regulation of air transportation to assure the highest degree of safety in such transportation.

h. Be conducted economically on a continuing basis.

i. Involve diversion of traffic, including the most profitable long-haul traffic (frequently referred to as "cream-skimming"), from the certificated carriers.

(4) Is the Board empowered under the Act, as now written to authorize, by certificate of public convenience and necessity under section 401 of the Act or by exemption under section 416 of the Act, such supplemental services limited as to type of service, type of traffic, quality or quantity of service, and/or equipment used, or otherwise restricted or defined.

(5) Should such supplemental services be authorized in whole or in part by permanent or temporary

certificate of public convenience and necessity, or by exemption orders or regulations issued pursuant to section 416(b) of the Act, or by more than one of these methods depending upon the facts and circumstances presented in individual cases, and should any classes or groups of carriers be established.

(6) What conditions, regulations or other requirements should be imposed by the Board for the purpose of achieving and defining such supplemental services, including

a. the extent to which existing applicable regulations, limitations, restrictions or other requirements should be modified or amended, including, for example, the modification of the so-called 3- and 8-trip limitation, requirements relating to lease of aircraft, etc.

b. whether maximum or minimum rates, fares and charges should be established and made applicable to such supplemental services.

(7) Should the supplemental services be provided by air carriers already certificated or exempted or by air carriers yet to be certificated or exempted.

2. That there are hereby consildated into this proceeding the proceedings on the pending applications for individual exemption orders filed by the following Large Irregular Carriers, as follows:

Docket No. 3945, Aero Finance Corporation

Docket No. 3845, Air Cargo Express, Inc.

Docket No. 3799, Air Services, Inc.

Docket No. 3840, Air Transport Associates, Inc.

Docket No. 3895, All-American Airways, Inc.

Docket No. 3908, American Air Transport, Inc.
Docket No. 3937, Arctic-Pacific, Inc.
Docket No. 3949, Argonaut Airways Corporation
Docket No. 3918, Arnold Air Service, Inc.
Docket No. 3889, Aviation Corporation of Seattle
Docket No. 3901, Caribbean-American Lines, Inc.
Docket No. 3798, Central Air Transport, Inc.
Docket No. 3876, Coastal Cargo Co., Inc.
Docket No. 3835, Continental Charters, Inc.
Docket No. 3903, Economy Airways, Inc.
Docket No. 3914, Federated Airlines, Inc.
Docket No. 3925, Freight Air, Inc.
Docket No. 3890, General Airways, Inc.
Docket No. 3894, Great Lakes Airlines, Inc.
Docket No. 3869, Hemisphere Air Transport
Docket No. 3821, Kesterson, Inc.
Docket No. 3939, Los Angeles Air Service
Docket No. 3887, Meteor Air Transport, Inc.
Docket No. 3844, Miami Airline, Inc.
Docket No. 3854, Modern Air Transport, Inc.
Docket No. 3779, Monarch Air Service
Docket No. 3842, New England Air Express, Inc.
Docket No. 3948, Pearson-Alaska, Inc.
Docket No. 3868, Peninsular Air Transport
Docket No. 3915, Regina Cargo Airlines, Inc.
Docket No. 3941, Robin Airlines, Inc.
Docket No. 3806, Royal Air Service
Docket No. 3905, Seaboard & Western Airlines, Inc.
Docket No. 3875, Skytrain Airways, Inc.

Docket No. 3917, Skyways International Trading and Transport Co., Inc.
Docket No. 3933, Sourdough Air Transport
Docket No. 3926, Southern Air Transport
Docket No. 3805, Trans-Alaskan Airlines, Inc.
Docket No. 3893, Trans American Airways
Docket No. 3879, Trans Caribbean Air Cargo Lines, Inc.
Docket No. 3896, Transocean Air Lines
Docket No. 3910, Trans National Airlines, Inc.
Docket No. 3846, Twentieth Century Air Lines, Inc.
Docket No. 3811, U. S. Aircoach
Docket No. 3947, United States Overseas Airlines, Inc.
Docket No. 3913, World Airways, Inc.

3. That the proceedings on the following applications for individual exemption orders be and they hereby are reopened and consolidated into this proceeding:

Docket No. 3916, Airline Transport Carriers, Inc.
Docket No. 3934, American Air Export and Import Company
Docket No. 3784, American Flyers, Inc.
Docket No. 3874, Associated Air Transport, Inc.
Docket No. 3833, Blatz Airlines, Inc.
Docket No. 3929, Capitol Airways, Inc.
Docket No. 3936, Conner Air Lines, Inc.
Docket No. 3951, Currey Air Transport, Ltd.
Docket No. 3848, Johnson Flying Service, Inc.
Docket No. 4233, Overseas National Airways
Docket No. 3921, Paul Mantz Air Services

Docket No. 3938, Quaker City Airways, Inc.
Docket No. 3780, Remmert-Werner, Inc.
Docket No. 3919, S. S. W., Inc.
Docket No. 3839, Standard Air Cargo
Docket No. 3922, Stewart Air Service
Docket No. 3902, The Unit Export Company, Inc.

Provided: that there shall be excluded from the issues in such reopened proceedings listed in this paragraph 3 any diminution in the period of authorization provided in the individual exemption orders issued to the applicants, but that the grant of larger authorization, and the question of renewing these exemptions upon the same or different terms shall be considered.

4. (Deleted).

5. That this proceeding be assigned for hearing before an Examiner of the Board, at such times and places as may be hereafter designated.

Exhibit "C."

Order No. E-8052

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the 20th day of January, 1954.

In the Matter of the Investigation of air services by Large Irregular Carriers and Irregular Transport Carriers. Docket No. 5132 *et al.*

ORDER.

It Appearing to the Board That:

1. The general purposes of this proceeding, instituted by order of the Board, Serial No. E-5722, dated September 21, 1951, as amended, are twofold. The first purpose is a general investigation into matters relating to and concerning air transportation conducted by the Large Irregular Air Carriers and Irregular Transport Carriers to determine whether there is a public need for limited additional and supplemental air service by such carriers and the terms and conditions under which any service found to be required should be authorized. These are essentially the matters set forth in paragraphs numbers 1(1) through 1(7) of Order No. E-5722, and involve issues of public convenience and necessity and public interest as those terms are used in the Act. (They are referred to collectively herein as the "public interest" questions.) The second purpose is to determine, in the event services of this type are found to meet a public need, which of the various applicants should be granted operating authority. This latter issue involves not only the question of fitness,

willingness, and ability raised by the applications for certificates under Section 401, but also any question of qualification and selection of individual carriers which may arise in connection with applications for exemption under Section 416(b). The Board has consolidated in this proceeding 208 pending applications by these carriers for authority to operate limited additional and supplemental air service under exemption or certificate of public convenience and necessity;

2. The hearings in this proceeding have been in almost continuous session since September 1952. General economic presentations relating to the public interest questions were made at the beginning of the hearing by 25 interveners and interested persons, and evidence with respect to the applications of thirty specific applicants has been heard. Thirty cases concerning individual applicants remain to be heard, and pending motions by several parties request that a final session be held for receipt of economic evidence of a general nature to be submitted in the light of the presentations of the applicants and of events occurring since the interveners presented their general evidence in 1952;

3. Evidence on their mode of operation and other aspects of fitness, willingness, and ability has been heard with respect to a sufficient number of the applicants to present to the Board a representative cross section of the irregular air carrier industry insofar as needed to determine the public interest questions related to the air transportation role, if any, to be assigned the irregular air carriers. Accordingly, the evidence to be received with respect to the remaining applicants' mode of operation and other aspects of fitness, willingness, and ability

will be largely cumulative insofar as concerns its use in determining such public interest questions;

4. On the basis of its experience thus far in this proceeding and the evidence adduced in the hearings up to the present time it is in the public interest to separate the general public interest questions and the issues regarding qualification of and selection; to receive the public interest evidence of the parties not yet heard on the public interest question and proceed to decision on that question; and to defer further hearing with respect to the qualification evidence of the applicants who have not yet been heard on that issue until after the basic decision on the public interest questions has been reached. In the opinion of the Board this will not only assist in accomplishing the desirable purpose of expediting decision on the public interest questions thus more quickly clarifying the future status of the irregular air carrier industry as a whole, but in addition will serve to expedite any further hearings that may be required on the question of qualification and to present the issues to the Board under circumstances that will assist it in arriving at a sound decision.

5. Unless a change in procedure is made, the hearings yet to be held will consume a substantial amount of time and the age of a large part of the earlier record may seriously impair its value and considerable rehearing may be needed;

6. A large part of the time spent in hearing evidence on individual applicants has been consumed in hearing matters relating to their mode of operation and fitness, willingness, and ability. The evidence that has been adduced will be useful in appraising the overall public interest problems, but such evidence on a representative cross section of the industry having been obtained, fur-

ther evidence of that type would not be needed for such appraisal but would be limited primarily to use in selecting individual carriers for authorization;

7. Further hearing at this time which would be devoted largely to receipt of evidence on fitness, willingness, and ability of the applicants is not necessary to reach a decision on the issue related to public interest and public convenience and necessity;

8. A decision on the role, if any, to be assigned to the Large Irregular Carriers and Irregular Transport Carriers could be reached much earlier if additional evidence on the issue of qualification be excluded in the further hearings prior to such decision, and the parties not yet heard limit their evidence to other matters relating to the requirements of the public interest and public convenience and necessity;

9. With such limitation of the issues, the Board could, after reaching its decision on the requirements of the public interest and the public convenience and necessity, order whatever further hearings on the issue of qualification such decision may require;

10. The parties would be able to make such later presentations on qualification more definite if made in the light of the Board's decision on the public interest aspect;

The Board finding that expeditious handling of the proceeding requires the action hereinafter ordered,

It Is Ordered That:

1. Holding of further hearing and receipt of additional evidence on issues relating to the identity, mode of operations, violations, and other aspects of the qualification of individual applicants be deferred until further order of the Board;

2. Further hearing be held at the earliest feasible time at which opportunity to present evidence on the requirements of the public interest and public convenience and necessity, particularly the issues set forth in paragraphs numbers 1(1) through 1(7) of Order Serial No. E-5722, dated September 21, 1951, as amended, be afforded to the individual applicants not yet heard, and opportunity be afforded to supplement previous presentations on these issues of the proceeding in the light of new matter that has been brought out since presentations at the beginning of the hearing and new facts that have since become available;

3. The issues in this proceeding with respect to the requirements of the public interest and the public convenience and necessity, as set forth in paragraphs numbers 1(1) through 1(7) of Order Serial No. E-5722, dated September 21, 1951, as amended, be decided before hearing further evidence on the qualification of individual applicants.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan

(Seal) Secretary.

Members Lee and Adams, Dissenting:

We cannot agree with the majority's decision to separate the general public interest question from the issues regarding qualification and selection of carriers because we do not believe that such action will expedite the disposition of this proceeding. On the contrary, it is our view that the present action of the majority will actually require additional time for final decision to be reached

unless the majority finds that there is no place for irregular air carriers in air transportation and therefore dismisses all of the applications on the ground that such services are not required. Only if this result is reached by the majority will the proceeding be expedited.

Under the present action of the majority, if the Board finds that there is a place for irregular carriers in air transportation, it will be necessary for the remaining 30 applicants in this case to present their views not only with respect to the question of fitness and ability but with respect to the public interest issue as well. As a matter of law, these applicants are entitled to fully present their case on both issues which means that they must be permitted to present evidence at the hearings, file briefs to the examiner, and after the issuance of an examiner's initial decision, file briefs and present oral argument to the Board with respect to both issues. All of these procedural steps will require a substantial period of time because instead of presenting one set of briefs, having one examiner's initial decision, and having one oral argument, it will be necessary to have two sets of briefs, two examiner's initial decisions, and two oral arguments before the decision could finally be implemented. This, of course, would require a substantial period of time and in the final analysis would delay the outcome of this proceeding for at least a year. Under the circumstances, we cannot agree with the procedure adopted by the majority which can expedite this proceeding *only* if the Board finds that the public interest does not require the services of irregular carriers. We are not prepared to make that finding at this time.

/s/ Josh Lee

/s/ Joseph P. Adams.

Exhibit "D."

Order No. E-9503

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 19th day of August, 1955.

In the matter of the Large Irregular Air Carrier Investigation. Docket No. 5132 *et al.*

Received Aug. 22, 1955. Keatinge, Arnold & Older.

ORDER REOPONING PROCEEDING.

A full public hearing having been held in the above-entitled proceeding, and the Board having considered the record and the briefs filed and having heard oral argument, and it appearing that:

1. The proper disposition of this proceeding requires the determination by the Board of the scope of supplemental air transportation to be furnished by large irregular air carriers and the designation of which of the applicants are qualified to render the service.

2. The formulation of the Board's views in an Opinion delineating the scope of required supplemental air transportation will take a period of time.

3. A large number of the applicants have not been heard with respect to their qualifications, and as to those already heard on this question, certain interested parties refrained from filing briefs to the Examiners due to doubt as to whether the matter of qualification was then ripe for decision.

4. It is in the public interest and would expedite the conclusion of this proceeding to proceed forthwith, in the same manner as heretofore, with the hearings as to the qualifications of those applicants who have not yet been heard as to their qualifications, and that such hearings may properly be conducted pending the preparation of the Board's Opinion delineating the scope of supplemental air transportation to be authorized.

Therefore, It Is Ordered That:

1. The record herein be and it is hereby reopened on the sole question of the qualifications of the applicants.

2. Hearings on the qualifications of applicants who have not been heard as to their qualifications be scheduled at the earliest possible dates.

3. The ultimate findings of the Examiners with respect to the qualifications of applicants already heard be and they are hereby vacated, and the Examiners be and they are hereby directed to reconsider such findings in the light of the briefs to be filed by the parties with the Examiners and to make new findings as to the qualifications of such applicants.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary.

(Seal)

Exhibit "E."

Order No. E-9584

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the 22nd day of September, 1955.

In the matter of the Large Irregular Air Carrier Investigation. Docket No. 5132 *et al.*

ORDER.

Petitions were filed on September 1, 1955, by Great Lakes Airlines, Inc., on September 2, 1955, by All American Airways, Inc., American Air Export and Import Company, Capitol Airways, Inc., Overseas National Airways, Inc., Trans Caribbean Airways, Inc., and United States Overseas Airlines, Inc., on September 6, 1955, by Economy Airways, Inc., and on September 7, 1955, by Central Air Transport, Inc., in which the petitioners ask permission to present additional evidence concerning their qualifications.

By petition filed September 14, 1955, Abilene & Southern Railway Co., *et al.,* oppose the requested reopening.

The Board finds that the petitions contain allegations of substantial changes that have occurred since the petitioners originally presented their evidence which justify reopening of the record to permit the parties to present additional evidence concerning the qualifications of the petitioners.

Accordingly, It Is Ordered:

1. That the record herein be and it is reopened to permit the parties to present additional evidence concerning changes in qualifications which have occurred since the presentation of evidence on that issue with respect to All American Airways, Inc., American Air Export and Import Company, Capitol Airways, Inc., Central Air Transport, Inc., Economy Airways, Inc., Great Lakes Airlines, Inc., Overseas National Airways, Trans Caribbean Airways, Inc., and United States Overseas Airlines, Inc.

2. That hearings to receive the aforesaid evidence be scheduled at the earliest possible date.

By the Civil Aeronautics Board.

/s/ M. C. Mulligan
M. C. Mulligan
Secretary.

(Seal)

Exhibit "F."

C.A.B. Docket No. 5132, *et al.*

Exh. No. AA-520
Page 1 of 1

EXCERPTS FROM TESTIMONY OF MALCOLM G. ROBERTSON IN THE SKYCOACH COMPIANCE CASE, DOCKET NO. 6908, JANUARY 31, 1955.

Transcript

Page	Lines
96	7-21 incl.
97	5-8 incl. (excluding words stricken).
98	3-end of page incl.
99	1-16 incl.
102	22-24 incl.
103	12-20 incl.
104	7-end of page incl.
105	Entire page.
106	8-21 incl.

Exhibits OC-34 and OC-35.

Exhibit "G."

CIVIL AERONAUTICS BOARD
Washington 25

December 9, 1955

Large Irregular Air Carrier Investigation. Docket No. 5132 *et al.*

Notice to All Parties:

Hearing of evidence remaining to be heard on the qualifications of applicants is hereby set for 10:00 a. m., January 4, 1956, in Room E-206, Temporary Building No. 5, 16th and Constitution Avenue, N. W., Washington, D. C. Evidence concerning these applicants will be heard in the following order:

1. Evidence on relationship between Great Lakes and Currey under Order No. E-9814, dated December 7, 1956, reopening proceeding.
2. Arnold Air Service, Inc.
3. Argonaut Airways Corporation
4. Continental Charters, Inc.
5. Miami Airline, Inc.
6. Peninsular Air Transport
7. Central Air Transport, Inc.

In order that the parties may make appropriate plans they are advised that the Examiners contemplate fixing a date for filing of briefs to the Examiners which will be approximately thirty days after completion of the hearing.

RALPH L. WISER
Ralph L. Wiser
RICHARD A. WALSH
Richard A. Walsh
Hearing Examiners.

Exhibit "H."

BEFORE THE
CIVIL AERONAUTICS BOARD.

In the Matter of the Investigation of Air Services by Large Irregular Carriers and Irregular Transport Carriers. Docket No. 5132, *et al.*

PETITION FOR RECONSIDERATION OF BOARD ORDER NO. E-9814, DATED DECEMBER 7, 1955, ON BEHALF OF GREAT LAKES AIRLINES, INC. AND CURREY AIR TRANSPORT LIMITED.

Dated: December 16, 1955.

Communications with respect to this document should be sent to: Keatinge and Older, 621 South Spring Street, Los Angeles 14, California. Attorneys for Petitioners.

BEFORE THE
CIVIL AERONAUTICS BOARD.

In the Matter of the Investigation of Air Services by Large Irregular Carriers and Irregular Transport Carriers. Docket No. 5132, *et al.*

PETITION FOR RECONSIDERATION OF BOARD ORDER NO. E-9814, DATED DECEMBER 7, 1955, ON BEHALF OF GREAT LAKES AIRLINES, INC. AND CURREY AIR TRANSPORT LIMITED.

Great Lakes Airlines, Inc. and Currey Air Transport Limited, applicants in Docket 5132, *et al.*, petition the Board for a reconsideration of Board Order No. E-9814, dated December 7, 1955, upon the following grounds:

I.

By Order No. E-9814, the Board ordered:

"1. That American's appeal from the Examiners' ruling be and it is hereby denied.

2. That the record herein be and it is hereby reopened to explore the relationship, if any, direct or indirect, between Great Lakes and Currey."

By this order, the Board has thrown open the proceeding to all parties for the purpose of exploring into matters which were covered exhaustively during the course of the hearings in Docket 5132 in Los Angeles during 1953. The hearings in Los Angeles in 1953, concerning applicants Great Lakes Airlines, Inc. and Currey Air Transport Limited, were in session during the period from August, 1953, to December, 1953. A substantial portion of this time was spent in exploring the alleged relationship between Great Lakes and Currey. Approximately four thousand (4,000) pages of the record in Docket 5132 were devoted to the cases of Great Lakes and Currey during the Los Angeles session in 1953. Numerous exhibits were introduced by the various parties during the course of the exploration.

The Board's order stems from an appeal by American Airlines from the ruling of the Examiners concerning the admissibility of the testimony of Malcolm G. Robertson in Docket 6908, and an alternative motion by American for a limited reopening of the proceeding in Docket 5132. But the Board order goes far beyond the relief requested by American. American requests that the Board reverse the Examiners' ruling with respect to the admissibility in this proceeding of the testimony of Malcolm G. Robertson in Docket 6908, or, in the alternative, modify its order reopening the proceeding herein with

respect to Great Lakes to the limited extent necessary to permit the introduction of the Robertson testimony. The Board's order throws the proceeding open to all parties for the purpose of "exploring" an alleged relationship which has already been explored fully during the course of three and one-half months of hearings in Los Angeles in 1953.

Nothing new whatever has been presented to the Board which would warrant such a procedure. Robertson's testimony in Docket 6908 concerns events which occurred in 1951, and which events were the subject of testimony by other witnesses who appeared in the Los Angeles session of the hearings in Docket 5132 during 1953. It is clear from the record, the appeal of American, and the brief of Great Lakes in opposition, that the existence of Robertson and his participation in the events concerning which he testified in Docket 6908 were known during the course of the Los Angeles hearings in Docket 5132 during 1953, and that American or any other party had ample opportunity to call Robertson to testify in connection with the alleged relationship between Great Lakes and Currey, which was being fully explored at that time. [See Tr. 22591, *et seq.*]

II.

Order No. E-9814, insofar as it applies to Petitioners, is in violation of the Fifth Amendment of the Constitution of the United States and the Administrative Procedure Act, and is arbitrary, unreasonable and capricious for the following reasons:

(a) There is no basis in the record or otherwise for reopening the proceeding with respect to Petitioners;

(b) The order is in conflict with the Board's previous orders in this proceeding, particularly Order No. E-5722, as amended, dated September 21, 1951; Order No. E-8052, dated January 20, 1954; and Order E-9584, dated September 22, 1955;

(c) The order is vague, ambiguous, uncertain, and unintelligible;

(d) The order is discriminatory with respect to Petitioners in that it accords Petitioners unequal treatment with the other applicants in this proceeding, and compels Petitioners to go through the same proceeding twice without reason or purpose.

On September 22, 1955, the Board ordered (Order No. E-9584):

> "1. That the record herein be and it is reopened to permit the parties to present additional evidence concerning changes in qualifications which have occurred since the presentation of evidence on that issue with respect to All American Airways, Inc., American Air Export and Import Company, Capitol Airways, Inc., Central Air Transport, Inc., Economy Airways, Inc., Great Lakes Airlines, Inc., Overseas National Airways, Trans Carribbean Airways, Inc., and United States Overseas Airlines, Inc."

Since September 22, 1955, and pursuant to Order No. E-9584, Petitioner Great Lakes has participated in hearings in Washington, D. C., and Los Angeles, California, and has presented additional evidence through witnesses and exhibits with respect to changes in the qualifications of Great

Lakes which have occurred since the prior hearings in this proceeding.

Without any basis whatever the Board now singles out these Petitioners from some sixty applicants and subjects them to further hearings of indeterminate scope and length in complete disregard of and contrary to the issues defined by the Board in Order No. 9584. Petitioners contend that by the arbitrary and discriminatory action reflected in Order No. 9814, the Board has denied to Petitioners due process of law and equal protection of the law. To limit the issues as to all parties in Order No. 9584, and then to enlarge the issues as to these Petitioners only in Order No. 9814 is arbitrary, unreasonable and capricious.

(e) The order places an unreasonable and unnecessary burden of expense and hardship upon Petitioners;

(f) The order will result in unnecessary and unreasonable delay in reaching the final decision sought by Petitioners in this proceeding.

(g) The order constitutes a denial of due process and equal protection of the law insofar as it applies to Petitioners.

III.

The Board's Order No. E-9814 is ambiguous. While it appears from the recitals preceding the directory part of the order that the Board is limiting its order reopening the proceeding to the testimony of Malcolm G. Robertson in Docket 6908, the directory part of the order does not limit the reopened hearing to the testimony of Robertson, but throws the proceeding open to all parties to explore without limitation or direction the relationship,

if any, between Great Lakes and Currey. The scope of the proceeding is measured by the directory part of the Board's order and not by recitals in the order, except where the recitals may be necessary to throw light upon the rest of the order. *W. R. Grace & Company v. Civil Aeronautics Board, et al.* (1946), 154 F. 2d 271; 2 AVI. 14116 (C. C. A. 2).

In view of the patent ambiguity existing in the present order, the order should be clarified, in the event the Board does not reverse the order as requested herein, by limiting the scope of any reopened proceeding to the testimony of Robertson. Further, in view of the Board's consideration of American's proposed exhibit AA-520 in connection with American's appeal, which exhibit contains references to the testimony of Robertson in Docket 6908, the Board's order should provide further that the testimony of Robertson to be admissible must be given in person and that Robertson shall be made available for full cross-examination by the parties. (See authorities cited in Great Lakes' brief in opposition to American's appeal in support of this proposition.)

IV.

By Notice to All Parties, dated December 9, 1955, the Examiners have notified Petitioners that the hearing of evidence on the relationship between Great Lakes and Currey under Order No. E-9814, dated December 7, 1955, is set for 10:00 A.M. January 4, 1956, in Washington, D. C. The hearing pursuant to Order No. E-9814 should not commence prior to the Board's decision on this Petition for Reconsideration of said order. Furthermore, Petitioners request that the hearing, if any, be held in Los Angeles, California. It would be an undue burden to require Petitioners to proceed to Washington for a

hearing on matters which could have been heard in Los Angeles in 1953, in this proceeding, but for the failure of American and the other parties to call a known and available witness at that time to testify to matters then under investigation in the hearing, when the witness' participation in the matters then being investigated was known to all parties at that time.

V.

Petitioners request that the Board make an immediate decision and order with respect to this Petition in order that Petitioners may have sufficient time to seek judicial review in accordance wth Section 1006 of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. A. 646).

WHEREFORE, Petitioners pray:

(1) That the Board reconsider Order No. 9814 and reverse paragraph (2) of said Order reopening the record;

(2) That if the Board does not reverse said order as requested, that the Board issue an order clarifying Order No. 9814, limiting the scope of any reopened proceeding to the taking of the oral testimony of Malcolm G. Robertson, and any cross-examination and rebuttal in connection therewith;

(3) That the Board stay the hearing in Docket 5132 with respect to these Petitioners now set for 10:00 A.M., January 4, 1956, in Washington, D. C., pending the Board's decision on this Petition;

(4) That any hearing held pursuant to Order No. 9814 or any further order be held in Los Angeles, California, with respect to these Petitioners;

(5) That the Board make an immediate decision on this Petition in order to allow Petitioners sufficient time to seek judicial review in accordance with Section 1006 of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. A. 646);

(6) For such other and further relief as may be just and proper.

Dated: December 16, 1955, at Los Angeles, California.

Respectfully submitted,

KEATINGE AND OLDER

By /s/ CHARLES H. OLDER

Charles H. Older

Attorneys for Petitioners.

CERTIFICATE OF SERVICE

I hereby certify that I have this day deposited in the mail a copy of the foregoing Petition for Reconsideration to all of the parties of record hereto. Said copies were placed in properly addressed envelopes with postage prepaid.

Dated: December 16, 1955, at Los Angeles, California.

KEATINGE AND OLDER

By /s/ CHARLES H. OLDER

Charles H. Older

Attorneys for Petitioners.

Exhibit "I."

Order No. E-9871

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C. on
the 23rd day of December, 1955

In the matter of the Large Irregular Air Carrier Investigation. Docket No. 5132.

ORDER DENYING PETTEION FOR RECONSIDERATION.

Great Lakes Airlines, Inc. (Great Lakes), and Currey Air Transport Limited (Currey) have filed a joint petition for reconsideration and other relief[1] from the Board's order of December 7, 1955 (Order No. E-9814) (1) denying an appeal of American Airlines, Inc. (American), from a ruling of the Examiner pertaining to admission of certain evidence and (2) reopening the record to explore the relationship, if any, direct or indirect, between Great Lakes and Currey.

Except insofar as discussed hereafter, the petition raises nothing new in the way of fact or argument that requires reconsideration. We do wish to comment specifically on several of the arguments advanced.

(1) The petition alleges that our order is vague, ambiguous, uncertain and unintelligible. The only ground cited is an alleged conflict between the recitals of fact and the ordering paragraph. There can be no conflict, however, since both are in exactly the same terminology.

---

[1]While time for answer to this petition has not run, in view of the nature of the action and in view of the request for immediate decision, the Board considers it in the public interest to act on this petition immediately.

The order goes beyond the scope of American's specific request to reopen for the obvious reason that other parties, petitioners included, may have additional or rebuttal evidence relevant to the relationship between the companies that may properly be heard in connection with the evidence American will adduce.

(2) The petition charges that our order is discriminatory inasmuch as it reopens the record only as to the petitioners and not as to the entire group. However, there is not the slightest intimation that there is cause to reopen the record as to other applicants. In our view the sound exercise of our discretion does not require us to reopen the record where no reason is alleged, merely to maintain a purely hypothetical procedural parity.

(3) The petition further charges that the reopening imposes an unreasonable and unnecessary burden of expense and hardship on the petitioners and will unreasonably and unnecessarily delay the final decision in the case. These changes are also unsupported, but in any event we consider the question raised by American's motion of sufficient import to the public interest to warrant the further examination of the relations between the applicants. Even if the substantive question as to the qualifications of the applicants were not so important, the Board would consider the preservation of the integrity of and respect for its hearing processes of sufficient importance to justify the inquiry into the apparent conflict in testimony concerning the petitioners.

(4) The petitioners request that we order any further hearings on the question raised by American's motion to be held in Los Angeles rather than Washington, where the Examiners have scheduled the hearing. They state that it would be an undue burden to require a hearing in Washington on evidence that could have been presented

in Los Angeles in 1953 but for American's failure to call the witness at that time. The petition again fails to allege any basis for its charge of undue burden. In the present posture of the case the Board cannot ascertain what witnesses will in fact be called or that there is any reason whatsoever for returning the hearing to Los Angeles. Moreover, the conduct of these hearings is still in the hands of our Examiner and any such request should be addressed to the Examiner, in the first instance, with appropriate supporting reasons. We are confident that the Examiner will give due consideration to such a request and take appropriate action if, at the reopened hearing, it appears that there is any good reason for hearing evidence in Los Angeles.

(5) Finally, the petitioners insist that our order should provide that American's evidence will be given by oral testimony rather than by incorporation of testimony from another proceeding. This matter is clearly within the province of the Examiner and is not properly before the Board in the absence of a ruling by the Examiner.

We have considered the allegations of the petition for reconsideration filed by Great Lakes and Currey and have concluded that they state no adequate grounds for relief. Accordingly, the petition will be denied.

IT IS THEREFORE ORDERED, That the petition for reconsideration of the Board's Order No. E-9814 filed on behalf of Great Lakes Airlines, Inc., and Currey Air Transport Limited be, and it hereby is, denied.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(Seal)

Exhibit "J."

WESTERN UNION TELEGRAM

(55) . . .

1955 Dec. 29 AMI 7 35

LA009 OD164

O WA083 29 Collect—WUX Washington DC 29 943 AME—

Charles H Older Keatinge and Older—

621 South Spring St LOSA—

Reurtel Dec 28, 1955, Hearing Order Docket 5132 Amended to Change Great Lakes-Currey Relationship to follow Peninsular or on Jan 17, 1956, whichever date later—

Ralph L Wiser Civil Aeronautics Board—

28 1955 5132 17 1956—

No. 14,994

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN E. KIRBY,

Appellant,

vs.

PAUL J. MADIGAN, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,994

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Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is conferred on this Court by Sections 2241 and 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant is a prisoner at the United States Penitentiary at Alcatraz, California (R. 10). He is serving a term of nine years which commenced on November 24, 1948 (R. 12). Good time credits were withheld from appellant pursuant to Section 4161 of Title 18 United States Code on two occasions (R. 13-14).

In connection with the first withholding of good time, appellant was served with the following notice:

> "Notice of Withholding of Good Time. To John E. Kirby, No. 950-AZ. Pursuant to authorization and instructions of the Director of the Bureau of Prisons and in accordance with the regulations of the Bureau, governing the withholding of good time, a special sub-committee was appointed by the Warden for the purpose of investigating your failure to earn statutory good time, by your conduct as follows: Subject assigned at his own request to the barber in Jan. 1952. On Feb. 7, 1952, he quit his job, even though the institution is short handed and in need of barbers. The Committee has recommended that good time be withheld each month, until such time, as subject requests and is permitted to return to his assignment and is released from segregation." (R. 13-14.)

Appellant's good time was withheld from March, 1952 until March, 1953 (R. 13).

On the second occasion appellant was deprived of good time from May, 1953 to April, 1955 for "Participating in a rebellious demonstration with other prisoners, in creating a serious disturbance, refusing to work and agitating other inmates to stop work and join in yelling and defying institutional authority during the month of May, 1953;" (R. 14). Appellant's version of his refusal to work was that "he did not desire to continue his duties as a barber; that such was not to the best interests of your petitioner due to his lack of physical well being at that time;

that his conduct in said capacity was exemplary; that his continuance in said capacity was not to the best interests of the institution; and that he desired, as soon as it could be most conveniently arranged, for the mutual benefit of all parties involved, work of some other nature commensurate with his physical ability and well being." (R. 15). Appellant was placed in confinement on the basis of his refusal to work (R. 15). He alleges that he informed the prison authorities that he desired work "commensurate with his ability to perform such;" (R. 15). The prison authorities determined that appellant was responsible for a "disturbance" and placed him in solitary confinement from May, 1953 until April, 1955 (R. 16).

Appellant admits that two prior applications for a writ of habeas corpus were denied by United States District Judge Louis E. Goodman (R. 7). In the instant case the record shows that a prior application for the writ was denied on August 22, 1955 by Judge Goodman (R. 3), and subsequently appellant applied for a writ of habeas corpus to Chief Judge William Denman of this Court (R. 4). On September 13, 1955 Chief Judge Denman transferred the petition to the District Court (R. 2). On September 22, 1955 United States District Judge George B. Harris denied the petition on the ground that there were no additional facts in the petition which would warrant the Court making a ruling different than that made by Judge Goodman on August 22, 1955 (R. 3). On September 26, 1955 appellant filed a sup-

plement to his petition for habeas corpus alleging that his good time was "forfeited" contrary to the provisions of Section 4165 of Title 18 United States Code. (R. 26). On September 28, 1955 Judge Harris issued an order to show cause (R. 34). On October 17, 1955 appellee moved to dismiss the petition on the grounds that it appeared on the face of appellant's petition that his record of conduct showed that he had not faithfully observed the rules of the United States Penitentiary at Alcatraz, California, and had been subjected to punishment and therefore, Section 4161 of Title 18 United States Code precluded the crediting of good time (R. 36). On November 3, 1955 Judge Harris dismissed the petition for habeas corpus and discharged the order to show cause (R. 41-42). Leave to appeal in forma pauperis was granted on November 14, 1955 (R. 44). Appeal was then taken to this Court (R. 40).

OPINION OF THE COURT.

"Order Dismissing Petition for Writ

"Petitioner, confined at Alcatraz, seeks his release on the grounds that he has completed service of his sentence. He contends that respondent has deprived him of good time in violation of the requirements for forfeiture set forth in 18 U.S.C.A. 4165.

"The short answer to petitioner's contention is found in 18 U.S.C.A. 4161. This section sets forth the conditions under which a prisoner may earn good time. When he has been placed in

confinement for failure to comply with the rules of the institution, he is ineligible to earn good time during the period of confinement.

"IT IS ORDERED that the petition for writ of habeas corpus be, and the same hereby is, DISMISSED AND THE Order to Show Cause be, and the same hereby is, DISCHARGED.

"Dated: Nov. *3*, 1955.

"/s/ GEORGE B. HARRIS
United States District Judge"

STATUTES INVOLVED.

Title 18 United States Code, Section 4161:

Section 4161. Computation generally.

Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, *whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence* beginning with the day on which the sentence commences to run, to be credited as earned and computed monthly as follows:

Five days for each month, if the sentence is not less than six months and not more than one year.

Six days for each month, if the sentence is more than one year and less than three years.

Seven days for each month, if the sentence is not less than three years and less than five years.

Eight days for each month, if the sentence is not less than five years and less than ten years.

Ten days for each month, if the sentence is ten years or more.

When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed. (Emphasis added.)

Title 18 United States Code, Section 4165:

Section 4165. Forfeiture for offense.

If during the term of imprisonment a prisoner commits any offense or violates the rules of the institution, all or any part of his earned good time may be forfeited.

QUESTION PRESENTED.

Is the withholding of good time credits governed by Section 4165 or Section 4161 of Title 18 United States Code?

ARGUMENT.

THE COURT SHOULD NOT INTERFERE WITH PRISON DISCIPLINARY MATTERS.

Appellant has been subjected to punishment, and his record of conduct shows that he has not fatihfully observed the rules of Alcatraz Penitentiary. It is his contention that he was justified in so doing. He denies that he was responsible for the riot which resulted in his confinement and the withholding of

a portion of his good time, and he claims the right to refuse work unless he so desires. Appellant is asking this Court to review the administration of the discipline at the United States Penitentiary, Alcatraz, California. He desires the Court to make a determination of fact with respect to the truth of the disciplinary charges brought against him. He demands that the Court find and enforce a right on the part of penitentiary inmates not to work.

Judicial review of prison discipline would open a Pandora's box of difficulties for both the administration of the Courts and of the prison system. If the prisons are required to administer discipline through the forms and the standard of proof required for conviction in Federal District Court, the administration of penitentiaries will become impossible. Alcatraz Penitentiary is a maximum close security prison. It contains the most desperate elements of the United States penitentiary population. More than once during the last few years these men have erupted into violence. The protection of the the guards and their families on Alcatraz and, in the last analysis, the citizens of the San Francisco Bay Area, depends upon the continuation of strict and stern discipline at the prison. Discipline at Alcatraz may not be conducted in accordance with the rules that have obtained at a Boy Scout summer camp.

The Courts have universally agreed that it is not the function of United States Courts to superintend the discipline of prisoners in penitentiaries. *Stroud v. Swope,* 9th Cir. 1951, 187 F.2d 850, 852, see cases

cited Note 3, cert. denied; *Numer v. Miller,* 9th Cir. 1948, 165 F.2d 986; *Dayton v. Hunter,* 10th Cir. 1949, 176 F.2d 108, cert. denied; *Williams v. Steele,* 8th Cir. 1952, 194 F.2d 917; *Kemmerer v. Benson,* 6th Cir. 1948, 165 F.2d 702, cert. denied.

The control of federal penitentiaries is entrusted to the Attorney General and the Bureau of Prisons under Sections 4001 and 4042 of Title 18 United States Code. *Sturm v. McGrath,* 10th Cir. 1949, 177 F.2d 472; *Powell v. Hunt,* 10th Cir. 1949, 172 F.2d 330. See also *Ponzi v. Fessenden,* 258 U.S. 254.

Appellant argues that he must be present at any hearing in which his good time is withheld. He argues that his good time is his as a matter of right and may only be withheld under the regulations which have been enacted pursuant to Section 4165 of Title 18 United States Code. Credit for good conduct does not accrue until such credit has been completely earned. *Grant v. Hunter,* 10th Cir. 1948, 166 F.2d 673, 674 (see cases collected in Note 2).

In the instant case appellant has admittedly been subjected to punishment, and his record of conduct shows that he has not faithfully observed the rules of the institution. Appellant disputes the truth of that record. However, he does not deny that the record so shows. He has asked the District Court to go behind the record and make an independent examination of the incidents which resulted in his discipline. Section 4161 of Title 18 United States Code rather than Section 4165 of Title 18 United States Code governs the withholding of good time

credits. *Isenberg v. Pescor* (D.C.W.D. Mo. 1946), 68 F.Supp. 584.

Appellant could not be credited with good time because he had been subject to punishment and, furthermore, he had not observed the rules. It was not necessary to forfeit his good time since he had not as yet earned it. In the judgment of the prison officials he had engaged in a disturbance and had refused to work, both of which they determined violated the rules of the institution. The Court below refused to interfere with this administration of discipline by those charged with the administration of it. This judgment should be affirmed.

Dated, San Francisco, California,
March 2, 1956.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.